SUBMITTED

268

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 268

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED MARCH 31, 1925

(30,963)

(30,963)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 998

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

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[fol. 1] CAPTION—Omitted

IN UNITED STATES DISTRICT COURT

Nos. 4172 & 4206, Criminal

THE UNITED STATES OF AMERICA

vs.

MEYER SELZMAN et al.

BILL OF INDICTMENT—Filed June 4, 1924

Be it remembered that heretofore, to-wit on the 4th day of June, A. D. 1924, and also on the 25th day of June, A. D. 1924, came a Grand Jury of the United States, to-wit: E. B. Willett, John M. Bargs, Mrs. Sarah Biddle, H. A. Tracht, E. W. Bonham, Charles Busick, Mrs. Bessie Dally, Mrs. Mollie Daoust, E. E. Decker, Mrs. Gibson P. Dildine, A. M. Donovan, Miss Emma Easterly, S. N. Fields, John A. Foust, John Russler, A. H. Muther, C. D. Hull, Carl J. Leitz, Mrs. Clara Link, J. C. Mullen, and Omar Spangler, which said Grand Jury returned indictments, endorsed, "A True Bill. E. B. Willett, Foreman Grand Jury," which indictments are in the words and figures following, to-wit:

[fol. 2] NORTHERN DISTRICT OF OHIO,
Western Division, ss:

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE DIVISION AND DISTRICT AFORESAID, AT THE APRIL TERM OF SAID COURT, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-FOUR

No. 4172, Criminal

The Grand Jurors of the United States of America, duly impanelled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oaths present and find that Meyer Selzman, Martin Bracker, Harry Porter, Aaron Liebenthal, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, during and throughout a period of time beginning on or about the 1st day of March, A. D. 1924, and ending on or about the 2nd day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together, with one another and each with the other to commit an offense against the United States, to wit, to wilfully, unlawfully,

knowingly and feloniously violate the Act of Congress of October 28, 1919, which Act is commonly known by the short title "National Prohibition Act," particularly Title III thereof, and the Regulations Relating to the Manufacture and Distribution of Industrial Alcohol Prescribed by the Commissioner of Internal Revenue pursuant to the provisions of Title III of said the National Prohibition Act, approved January 31st, 1920, and particularly Article 108 thereof, in that they, being then and there dealers in completely denatured alcohol, [fol. 3] would knowingly, wilfully and unlawfully sell and offer for sale completely denatured alcohol in packages containing less than five wine gallons without having affixed to said packages a label or labels on which was printed in plain legible letters (red on white), the words "Completely denatured alcohol," and without having in addition printed on the aforesaid label or labels, in large letters, in red ink, under the skull and bone symbol the words "Poison," together with the following statement: "Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissues without serious injurious results. It can not be taken internally without inducing blindness and general physical decay, ultimately resulting in death," contrary to and in violation of and not in accordance with the terms and provisions of Title III of said the National Prohibition Act aforesaid and contrary to and in violation of and not in accordance with the terms and provisions of said Regulations of the Commissioner of Internal Revenue Relating to the Manufacture and Distribution of Industrial Alcohol aforesaid.

Overt Acts

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that certain of said defendants, at the several times and places hereinafter mentioned in connection with their names, did perform certain acts in pursuance of, in execution of, and to effect the object of said unlawful, wilful and felonious conspiracy, combination, confederation and agreement, that is to say

First. That the defendants Meyer Selzman, Martin Bracker, Harry Porter and Aaron Liebenthal, during and throughout a period of time beginning on or about the 1st day of March, A. D. 1924, and ending on or about the 2nd day of April, A. D. 1924, at Toledo, County of Lucas, State of Ohio, Western Division of the Northern District of Ohio and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously sell and offer for sale, and [fol. 4] did cause and procure to be sold and offered for sale and did aid, assist, abet, counsel and advise in the sale of and in the offering for sale to Philip Thomas, James Ryan, William Cronin, Jack Davin, William Rickey, James Carter, and to divers other persons whose names are to the Grand Jurors unknown and therefore not herein set forth, large quantities of completely denatured alcohol in packages containing less than five wine gallons, the exact dates of said sales and offers for sale of the aforesaid completely denatured alcohol and the respective amounts of same being to the Grand Jurors un-

known and therefore not herein set forth, which said packages then and there contained less than five wine gallons of completely denatured alcohol and on which said packages there was not then and there affixed a label or labels on which was printed in plain, legible letters (red on white), the words "Completely denatured alcohol" and without having in add-tion printed on the aforesaid label or labels, in large letters, in red ink, under the skull and bone symbol the word "Poison," together with the following statement: "Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissues without serious injurious results. It can not be taken internally without inducing blindness and general physical decay, untimately resulting in death," contrary to and in violation of and not in accordance with the terms and provisions of Title III of said the National Prohibition Act aforesaid and contrary to and in violation of and not in accordance with the terms and provisions of said Regulations of the Commissioner of Internal Revenue Relating to the Manufacture and Distribution of Industrial Alcohol aforesaid.

Second. That the said defendant Martin Bracker on or about the 1st day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, Western Division of the Northern District of Ohio and within the jurisdiction of this Court, did wilfully, knowingly and un-|fol. 5| lawfully sell and offer for sale to one James Ryan a full half pint bottle of completely denatured alcohol which said bottle containing said completely denatured alcohol did not then and there have affixed thereto a label on which was printed in plain, legible letters (red on white), the words "Completely denatured alcohol," and without having in addition printed on the aforesaid label, in large letters, in red ink, under the skull and bone symbol the word "Poison," together with the following statement: "Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissues without serious injurious results. It can not be taken internally without inducing blindness and general physical decay, ultimately resulting in death," contrary to and in violation of and not in accordance with the terms and provisions of title III of said the National Prohibition Act aforesaid and contrary to and in violation of and not in accordance with the terms and provisions of said Regulations of the Commissioner of Internal Revenue Relating to the Manufacture and Distribution of Industrial Alcohol aforesaid.

Third. That the said defendant Meyer Selzman during and throughout a period of time beginning on or about the 1st day of March, A. D. 1924, and ending on or about the 2nd day of April, A. D. 1924, at Toledo aforesaid, did instruct the defendants Martin Bracker, Harry Porter and Aaron Liebenthal, the said defendants Martin Bracker, Harry Porter and Aaron Liebenthal being then and there employees and agents of him the said defendant Meyer Selzman, to sell and offer for sale completely denatured alcohol in packages containing less than five wine gallons without then and there affixing to said packages labels on which were printed in plain,

legible letters (red on white), the words "Completely denatured alcohol," and without having in addition printed on the aforesaid labels, [fol. 6] in large letters, in red ink, under the skull and bone symbol the word "Poison," together with the following statement: "Completely denatured alcohol is a violent poison. It cannot be applied externally to human or animal tissues without serious injurious results. It cannot be taken internally without inducing blindness and general physical decay, ultimately resulting in death."

Conclusion

And so the Grand Jurors, upon their oaths aforesaid, do say that the said defendants Meyer Selzman, Martin Bracker, Harry Porter and Aaron Liebenthal, and with divers other persons whose names are to the Grand Jurors unknown and therefore not set forth herein, throughout the period of time and place and in the manner and form aforesaid, unlawfully, wilfully, knowingly, and feloniously did conspire to commit an offense against the United States, and did do acts to effect the object of said conspiracy;

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count II

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker, Harry Porter, Aaron Liebenthal, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, during and throughout a period of time beginning on or about the 1st day of March, A. D. 1924, and ending on or about the 2nd day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously sell and offer for sale and did cause and procure to be sold and offered for sale, and did aid, assist, abet, counsel and advise in the sale of, and in the offering for sale to [fol. 7] Phillip Thomas, James Ryan, William Cronin, Jack Davis, William Rickey, James Carter and to divers other persons whose names are to the Grand Jurors unknown and therefore not herein set forth, large quantities of completely denatured alcohol in packages containing less than five wine gallons, the exact dates of said sales and offers for sale of the aforesaid completely denatured alcohol and the respective amounts of same being to the Grand Jurors unknown and therefore not herein set forth, which said packages then and there contained less than five wine gallons of completely denatured alcohol and on which said packages there was not then and there affixed a label or labels on which was printed in plain, legible letters (red on white), the words "Completely denatured alcohol" and without having in addition printed on the aforesaid label or labels, in large letters, in red ink, under the skull and bone symbol

the word "Poison," together with the following statement: "Completely denatured alcohol is a violent poison. It can be applied externally to human or animal tissues without serious injurious results. It cannot be taken internally without inducing blindness and general physical decay, ultimately resulting in death," contrary to and in violation of and not in accordance with the terms and provisions of Title III of said National Prohibition Act aforesaid and contrary to and in violation of and not in accordance with the terms and provisions of said Regulations of the Commissioner of Internal Revenue Relating to the Manufacture and Distribution of Industrial Alcohol aforesaid;

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Miles E. Evans, Assistant United States Attorney.

[fol. 8] [File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

BILL OF INDICTMENT—Filed June 25, 1924

THE UNITED STATES OF AMERICA,
Northern District of Ohio,
Western Division, ss:

In the District Court of the United States within and for the Division and District Aforesaid, at the April Term of said Court, in the Year of Our Lord One Thousand Nine Hundred and Twenty-four

No. 4206, Criminal

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oaths present and find that Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, between the 1st day of March, A. D. 1924, to and including the 2nd day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together with one another, and each with the other, to commit an offense against the United States, to wit, to violate the Act of Congress of October 28, 1919, which Act is commonly known by the short title "National Prohibition Act," particularly Title II thereof, in that they would unlawfully, wilfully, and knowingly sell denatured alcohol, an intoxicating liquor, for beverage purposes, contrary to, and in violation of, the provisions of the National Prohibition Act aforesaid.

Overt Acts

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that certain of said defendants, at the several times and places hereinafter mentioned in connection with their [fol. 10] names, did perform certain acts in pursuance of, in execution of, and to effect the object of said unlawful, wilful and felonious conspiracy, combination, confederation, and agreement, that is to say,

First. That at various times not specifically known to the Grand Jurors and therefore not specifically alleged, but during the period from March 1st, 1924, to April 2nd, 1924, the defendants Meyer Selzman, Martin Bracker, and Harry Porter, wilfully, knowingly and feloniously did sell to Phillip Thomas, James Ryan, William Cronin, Jack Davis, William Rickey, James Carter, and to other persons whose names are to the Grand Jurors unknown and therefore not alleged, large amounts of denatured alcohol, an intoxicating liquor, for beverage purposes, the exact quantities being to the Grand Jurors unknown and therefore not alleged, under circumstances from which the said defendants, being them and there the sellers of said amounts of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes.

Second. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendant Meyer Selzman acted as, and was, the owner and proprietor of a drug store at 2002 Canton Avenue, Toledo, Ohio, wherein he directed and conducted the business of selling denatured alcohol under circumstances from which said defendant Meyer Selzman might reasonably have deduced the intention of the purchasers of said denatured alcohol to use same for beverage purposes.

Third. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendant Meyer Selzman instructed his employees, the defendants Martin Bracker and Harry Porter to sell denatured alcohol without placing labels on bottles except in the cases where the purchases were made by well dressed customers.

[fol. 11] Fourth. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendants Martin Bracker and Harry Porter acted as, and were, clerks and assistants of the defendant Meyer Selzman, and as such clerks and assistants of the defendant Meyer Selzman, made sales of denatured alcohol to the persons and in the amounts and manner specified in the first Overt Act;

Contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count II

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present and find that the said Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, on or about the 30th day of March, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly did sell to Tommy Callahan, one-half (½) pint of denatured alcohol, under circumstances from which the said defendants, being then and there the sellers of said amounts of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes, contrary to the provisions of the National Prohibition Act;

Contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count III

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, on [fol. 12] or about the 1st day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, unlawfully, wilfully, and knowingly did sell to Tommy Callahan one (1) pint of denatured alcohol, under circumstances from which the said defendants, being then and there the sellers, of said amount of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes, contrary to the provisions of the National Prohibition Act;

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count IV

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, on or about the 1st day of April, A. D. 1923, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid, and within the jurisdiction of this Court, unlawfully, wilfully and knowingly did sell to James Ryan, one-half (½) pint of denatured alcohol, under circumstances from which the said defendants, being then and there the sellers of said amount of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes, contrary to the provisions of the National Prohibition Act;

Contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

[fol. 13] Count V

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, on or about the 30th day of March, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, unlawfully, wilfully, and knowingly did sell to Philip Thomas one (1) pint of denatured alcohol, under circumstances from which the said defendants, being then and there the sellers of said amount of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes; contrary to the provisions of the National Prohibition Act;

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count VI

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, on or about the 30th day of March, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and within the jurisdiction of this Court, unlawfully, wilfully and knowingly, did sell to William Cronin large quantities of denatured alcohol, the exact quantities being to the Grand Jurors unknown and therefore not alleged, under circumstances from which the said defendants, being then and there the sellers of said amounts of denatured alcohol, might reasonably have [fol. 14] deduced the intention of said purchasers to use said denatured alcohol for beverage purposes, contrary to the provisions of the National Prohibition Act;

Contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Count VII

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Meyer Selzman, Martin Bracker, and Harry Porter, hereinafter known and referred to as the defendants, late of the Division and District aforesaid, heretofore, to wit, between the 1st day of March, A. D. 1924, to and including the 2nd day of April, A. D. 1924, at Toledo, in the County of Lucas, State of Ohio, in the Division and District aforesaid and

within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together with one another, and each with the other, to commit an offense against the United States, to wit, to violate the Act of Congress of October 28, 1919, which Act is commonly known by the short title "National Prohibition Act," particularly Title II thereof, in that they would unlawfully, wilfully and knowingly sell denatured alcohol, an intoxicating liquor, for beverage purposes, under circumstances from which the said defendants, being then and there the sellers of said amounts of denatured alcohol, might reasonable have deduced the intention of said purchasers to use said denatured alcohol for beverages purposes, contrary to, and in violation of, the provisions of the National Prohibition Act aforesaid.

Overt Acts

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that certain of said defendants, at the several times and places hereinafter mentioned in connection with [fol. 15] their names, did perform certain acts in pursuance of, in execution of, and to effect the object of said unlawful, wilful and felonious conspiracy, combination, confederation and agreement, that is to say

First. That at various times not specifically known to the Grand Jurors and therefore not specifically alleged, but during the period from March 1st, 1924, to April 2nd, 1924, the defendants Meyer Selzman, Martin Bracker, and Harry Porter, wilfully, knowingly and feloniously did sell to Phillip Thomas, James Ryan, Willis Cronin, Jack Davis, William Rickey, James Carter, and to other persons whose names are to the Grand Jurors unknown and therefore not alleged, large amounts of denatured alcohol, an intoxicating liquor, for beverage purposes, the exact quantities being to the Grand Jurors unknown, and therefore not alleged, under circumstances from which the said defendants, being then and there the sellers of said amounts of denatured alcohol, might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes.

Second. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendant Meyer Selzman acted as, and was the owner and proprietor of a drug store at 2002 Canton Avenue, Toledo, Ohio, wherein he directed and conducted the business of selling denatured alcohol under circumstances from which said defendant Meyer Selzman might reasonably have deduced the intention of the purchasers of said denatured alcohol to use same for beverage purposes.

Third. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendant Meyer Selzman instructed his employees, the defendants Martin Bracker and Harry Porter to sell denatured alcohol without placing labels on

bottles except in the case where the purchases were made by well dressed customers.

[fol. 16] Fourth. That during the period from March 1st, 1924, to April 2nd, A. D. 1924, at Toledo aforesaid, the defendants Martin Bracker and Harry Porter acted as, and were, clerks and assistants of the defendant Meyer Selzman, and as such clerks and assistants, made sales of denatured alcohol to the persons and in the amounts and manner specified in the first Overt Act;

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Geo. E. Reed, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 17] In United States District Court

Demurrer (to No. 4172)—Filed June 12, 1924

The defendant Meyer Selzman says that Count I of the said Indictment is not sufficient in law, and assigns the following as his grounds of demurrer:

1. That the said indictment does not charge the violation of any statute of the United States.

2. That the said indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

We hereby certify that this demurrer is filed in good faith, and not for the purpose of delay.

Cornell Schreiber, Joseph C. Breitenstein, Gerard J. Pilliod,
Rocker & Schwartz, Attorneys for Defendant.

Toledo, Ohio, June 12th, 1924.

I hereby acknowledge receipt of notice of the filing of the above demurrer to indictment.

Geo. E. Reed, Assistant United States District Attorney.

[fol. 18] In United States District Court

Demurrer (to No. 4172)—Filed June 12, 1924

The defendant Meyer Selzman says that Count II of the said Indictment is not sufficient in law, and assigns the following as his grounds of demurrer:

1. That the said indictment does not charge the violation of any statute of the United States.

2. That the said indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

We hereby certify that this demurrer is filed in good faith, and not for the purpose of delay.

Cornell Schreiber, Joseph C. Breitenstein, Gerard J. Pilliod, Rocker & Schwartz, Attorneys for Defendant.

Toledo, Ohio, June 12th, 1924.

I hereby acknowledge receipt of notice of the filing of the above demurrer to indictment.

Geo. E. Reed, Assistant United States District Attorney.

[fol. 19] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the First Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

1. That the said indictment does not charge the violation of any statute of the United States.

2. That the said indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 20] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Second Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 21] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Third Count of the Indictment and says that said Indictment *and says that said Indictment* is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Fourth Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 23] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Fifth Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 24] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Sixth Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Now comes the defendant Meyer Selzman and Demurs to the Seventh Count of the Indictment and says that said Indictment is not sufficient in law and assigns the following as his grounds of Demurrer:

First. That the said Indictment does not charge the violation of any statute of the United States.

Second. That the said Indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

B. Schwartz, J. C. Breitenstein, G. J. Pilliod.

[fol. 26] IN UNITED STATES DISTRICT COURT

DEMURRER (TO NO. 4206)—Filed Oct. 9, 1924

Meyer Selzman, defendant herein having heretofore filed his Demurrer to the indictment in the above named case, and to each count thereof, now comes before this Honorable Court and, further demurring to the said indictment and to each seperate count thereof because the same are not sufficient in law, assigns the following additional *additional* ground for such demurrer:

That Section 4 of the Act of October 28, 1919, otherwise known as the "National Prohibition Act" or "The Volstead Act," is the section of the said Act to which Counts 1 and 7 of the said indictment relate, and under which Counts 2, 3, 4, 5, and 6, of the said indict-

ment are directly brought; That the provision of the said section relating to the sale of denatured alcohol for beverage purposes and imposing a penalty for such sale is unconstitutional because Congress had no authority to enact such provision of the said section of the said Act and because so authority for the enactment or enforcement of such provision can be found in the Constitution of laws of the United States: That the indictment herein and each seperate count thereof is, therefore, null and void and of no effect.

B. Schwartz, J. C. Breitnestein, G. J. Pilliod, Attorneys for Meyer Selzman.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRERS (TO #4172)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, Meyer Selzman, Martin Bracker, Harry Porter, and Aaron Liebenthal, accompanied by counsel, at the bar of court. And thereupon this case came on to be heard upon the demurrers filed herein, by these defendants. And the Court upon consideration thereof, overrules said demurrers, to which orders of the court the demendants, by their attorneys except.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRERS (TO #4206)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, at the bar of court, accompanied by counsel. And thereupon this cause came on to be heard upon the demurrers heretofore filed herein, And the court upon consideration thereof, overrules said demurrers, to which orders of the court the defendants, by their attorneys except.

[fol. 29] IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA (TO #4172)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, Meyer Selzman, Martin Bracker, Harry Porter and Aaron Liebenthal, accompanied by counsel, at the bar of court. And said defendants being arraigned and waiving the reading of the indictment herein, each for his plea thereto, says that he is not guilty as he is therein and thereby charged. It is thereupon ordered that said defendants be passed for trial, and that the defendant Meyer Selzman, be released upon a

recognizance in the sum of $5,000.00, that the defendant Martin Bracker be released upon a recognizance in the sum of $2,000.00, and the defendants Harry Porter and Aaron Liebenthal be released upon their own recognizances in the sum of $1,500.00, each.

[fol. 30] IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA (#4206)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, at the bar of court. And said defendants being arraigned and waiving the reading of the indictment herein, each for his plea thereto, says that he is not guilty as he is therein and thereby charged.

It is now ordered that said defendants be passed for trial and that the bond of Meyer Selzman, be fixed in the sum of $5,000.00, the bond of Martin Bracker be fixed in the sum of $2,000.00, and that the defendant Harry Porter be released upon his own recognizance in the sum of $1,500.00.

[fol. 31] IN UNITED STATES DISTRICT COURT

ORDER CONSOLIDATING CASES #4172 & #4206—Oct. 9, 1924

For satisfactory reasons appearing to the court, and for good cause shown, it is ordered that this case be consolidated with case No. 4206, in this court, for the purposes of trial only.

For satisfactory reasons appearing to the court, and for good cause shown, it is ordered that this case be consolidated with case No. 4172, in this court, for the purposes of trial only.

[fol. 32] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

JURY EMPANELED AND SWORN: TRIAL IN PROGRESS (#4172)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, accompanied by counsel, at the bar of court. And said defendants having heretofore been arraigned and entered their pleas of not guilty as to the indictment herein, thereupon this case came on to be heard upon the pleadings and the evidence.

Thereupon came the following named persons, as jurors to-wit: J. W. Borough, H. A. J. Bowman, Mrs. Fred Williams, Lawrence

Geiger, Perry F. Wendler, George Book, W. J. Bracey, Charles Dicken, Ralph Hoyt, Mrs. T. M. Spillane, Alva Edgecomb and William Jones, and the panel being complete, said jurors were duly impanelled and sworn herein, and the trial proceeded. And at the close of the opening statement of counsel for the plaintiff, defendants, by their counsel, moved the court for an order discharging the defendants herein, from this case. And the court, upon consideration thereof, overrules said motion, to which order of the court, the defendants, by their attorneys except. Thereupon the defendants, by their counsel moved the court for an order, dismissing these defendants, as to Count II of the Indictment herein. And the Court, upon consideration thereof, grants said motion, and dismisses these defendants as to the second count of the indictment herein. And said jury having heard the opening statements of the counsel for the defendants and a part of the testimony on behalf of the United States, but not the conclusion thereof, and the hour of adjournment having arrived, the further trial of this case is continued until tomorrow morning, at 9.30 o'clock.

[fol. 33] JURY IMPANELED AND SWORN; TRIAL IN PROGRESS (#4206)—Oct. 9, 1924

This day came the United States Attorney on behalf of the United States and also came the defendants, Meyer Selzman, Martin Bracker, and Harry Porter, accompanied by counsel, at the bar of court. And said defendants having heretofore been arraigned and entered their pleas of not guilty as to the indictment herein, thereupon this cause came on to be heard upon the pleadings and the evidence. Thereupon came the following named persons, as jurors, to-wit: J. W. Borough, H. A. J. Bowman, Mrs. Fred Williams, Lawrence Geiger, Perry F. Wendler, George Book, W. J. Bracey, Charles Dicken, Ralph Hoyt, Mrs. T. M. Spillane, Elva Edgecomb, and William Jones, and the panel being complete, said jurors were duly impaneled and sworn and the trial proceeded. And said Jury having heard the opening statement of counsel for plaintiff, thereupon the defendants, by their counsel, moved the court for an order discharging the defendants herein from this case. And the court upon consideration thereof, overrules said motion, to which order of the court the defendants by their attorneys except. And said jury having heard the opening statements of counsel for the defendants, and a part of the testimony on behalf of the plaintiff, but not the conclusion thereof, and the hour of adjournment having arrived, the further trial of this case is continued until tomorrow morning, at 9:30 o'clock.

[fol. 34] Trial in Progress (#4172)—Oct. 10, 1924

This day again came the United States Attorney on behalf of the United States and also came the defendants accompanied by their

counsel, at the bar of the court. And came also the jury, heretofore impanelled and sworn herein, and the trial proceeded. And the testimony on behalf of the plaintiff being partially completed, thereupon the court, ordered that this case be and it hereby is dismissed as to count one of the Indictment herein, against Harry Porter, and that an order of nolle prosequi be, and the same hereby is entered as to the defendant Aaron Liebenthal, as to all counts of the indictment herein, pending against him, and the trial proceeded as to the defendants Meyer Selzman and Martin Bracker. And said jury having heard all of the testimony herein on behalf of the plaintiff and all of the testimony on behalf of the defendants, thereupon the defendants Meyer Selzman and Martin Bracker, by their attorneys moved the court for an order directing a verdict in their favor and against said plaintiff. And the court, upon consideration of said motion, overrules the same, to which order of the court, the defendants, by their attorneys, except and the trial again proceeded. And the hour of adjournment having arrived, the further hearing of this case is continued until Tuesday morning October 14, 1924, at nine thirty o'clock.

[fol. 35] Trial in Progress (#4206)—Oct. 10, 1924

This day again came the United States Attorney on behalf of the United States and also came the defendants, acompanied by counsel at the bar of court. And also came the jury, heretofore impaneled and sworn herein, and the trial proceeded. And the testimony on behalf of the plaintiff being partially completed, said defendant Harry Porter, with leave of court first duly had and obtained, withdraws his said plea of not guilty as to the indictment herein, and says that he is guilty as he is therein and thereby charged in counts two, three, five, and six of the indictment herein. Thereupon the Court ordered that the charges of conspiracy in counts 1 and 7 against the defendant Harry Porter be, and the same are hereby dismissed and the trial again proceeded as to the defendants Meyer Selzman and Martin Bracker and as to count four, against the defendant Harry Porter.

At the close of the testimony on behalf of the defendants, said defendants Meyer Selzman and Martin Bracker, by their counsel, moved the court for an order directing a verdict in favor of said defendants and against said plaintiff. And the Court, upon consideration thereof, overrules said motion, to which order of the Court, the defendants, by their attorneys, except, and the trial again proceeded.

And now with leave of the United States District Attorney, on motion of Royal B. Binzer, attorney for the defendant Harry Porter, and by direction of the Court, said defendant, Harry Porter is allowed to withdraw his said plea of guilty as to the indictment herein, which leaves said defendant Harry Porter, without plea. And the court, upon consideration thereof, orders that an order nolle prosequi be, and the same is hereby entered as to the defendant Harry Porter, and the trial again proceeded. And said jury having heard further

testimony herein, but not the conclusion thereof, and the hour of adjournment having arrived, the further trial of this case is continued until Tuesday morning, October 14, 1924, at nine thirty o'clock.

[fol. 36] IN UNITED STATES DISTRICT COURT

VERDICT (#4172) & SENTENCE—Oct. 14, 1924

This day again came the United States Attorney on behalf of the United States and also came the defendants accompanied by their counsel, at the bar of court. And also came the jury, heretofore impaneled and sworn herein, and the trial proceeded. And said jury having heard the remainder of the testimony herein, thereupon the defendants, by their counsel, moved the court to direct a verdict in their favor, and against said plaintiff. And the court, upon consideration thereof, overrules said motion, to which order of the court, the defendants, by their counsel, except. And thereupon the trial proceeded. Said jury having heard all of the argument of counsel, and charge of the court, retired to their room in charge of a sworn officer, for deliberation.

And now comes said jury into open court, with their verdict in writing, signed by their foreman, and say:

"We, the Jury in this case, being duly impaneled and sworn, do find as to the First Count of the Indictment the defendant, Martin Bracker, is Guilty; as to the First Count of the Indictment the defendant, Meyer Selzman, is Guilty.

H. A. J. Bowman, Foreman."

And the Court having inquired of said defendant Martin Bracker if he had anything to say why sentence should not be pronounced upon him, and having received his reply thereto, it is now ordered that said defendant pay a fine to the United States of America, in the sum of $75.00. It is further ordered that this sentence be suspended for thirty days. It is further ordered that the defendant Meyer Selzman, be remanded to the Lucas County Jail, at Toledo, Ohio, to await sentence herein, and that the jury deliberating in this case be and the same is hereby discharged from further consideration of this case.

[fol. 37] IN UNITED STATES DISTRICT COURT

VERDICT (#4206) & SENTENCE—Oct. 14, 1924

This day again came the United States Attorney on behalf of the United States and also came the defendants, accompained by their counsel, at the bar of court. And also came the jury, heretofore impaneled and sworn herein and the trial proceeded. And said jury

having heard the remainder of the testimony herein, thereupon the counsel for the defendants moved the court for an order directing a verdict in favor of said defendants and against said plaintiffs. And the court upon consideration of said motion, overrules the same, to which order of the court the defendants, by their attorneys except, and the trial proceeded. And thereupon the United States Attorney moved the court for an order dismissing the fourth count of the indictment herein, and the court, upon consideration thereof, grants said motion, and the trial again proceeded. And said jury having heard all of the argument of counsel and charge of the court, retired to their room in charge of a sworn officer for deliberation.

And now comes said jury into open court with their verdict in writing, signed by their foreman, and say:

"We, the Jury in this case, being duly impaneled and sworn, do find the Defendant Meyer Selzman, as to the First Count of the Indictment is —; Meyer Selzman as to the Second Count of the Indictment is Guilty; Meyer Selzman as to the Third Count of the Indictment is Guilty; Meyer Selzman as to the Fifth Count of the Indictment is Guilty; Meyer Selzman as to the Sixth Count of the Indictment is Guilty; Meyer Selzman as to the Seventh Count of the Indictment is —; Martin Bracker as to the First Count of the Indictment is —; Martin Bracker as to the Second Count of the Indictment is Guilty; Martin Bracker as to the Third Count of the Indictment is Guilty; Martin Bracker as to the Fifth Count of the Indictment is Guilty; Martin Bracker as to the Sixth Count of the Indictment is Guilty; Martin Bracker as to the Seventh Count of the Indictment is —;

H. A. J. Bowman, Foreman."

[fol. 38] It is now ordered that the jury deliberating herein, be and the same is hereby discharged from further consideration of this case. And the Court having inquired of said defendant Martin Bracker if he had anything to say why sentence should not be pronounced upon him, upon the verdict of guilty heretofore returned herein, against him, and having received his reply thereto, it is now ordered that said defendant pay a fine to the United States of America, in the sum of $75.00. It is further ordered that execution of this sentence be suspended for thirty days. It is further ordered by the Court that the defendant Meyer Selzman be remanded to the Lucas County Jail, at Toledo, Ohio, to await sentence, herein.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed October 14, 1924, No. 4172

We, the Jury in this case, being duly impanelled and sworn, do find as to the First Count of the Indictment, the Defendant Martin

Bracker is Guilty; as to the First Court of the Indictment, the Defendant Meyer Selzman is Guilty.

H. A. J. Bowman, Foreman.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed October 14, 1924, No. 4206

We, the Jury in this case, being duly impanelled and sworn, do find the Defendant Meyer Selzman, as to the First Count of the Indictment is —; Meyer Selzman, as to the Second Count of the Indictment, is Guilty; Meyer Selzman, as to the Third Count of the Indictment is Guilty; Meyer Selzman, as to the Fifth Count of the Indictment is Guilty; Meyer Selzman, as to the Sixth Count of the Indictment is Guilty; Meyer Selzman, as to the Seventh Count of the Indictment is —; Martin Bracker, as to the First Count of the Indictment is —; Martin Bracker, as to the Second Count of the Indictment is Guilty; Martin Bracker, as to the Third Count of the Indictment is Guilty; Martin Bracker, as to the Fifth Count of the Indictment is Guilty; Martin Bracker, as to the Sixth Count of the Indictment is Guilty; Martin Bracker, as to the Seventh Count of the Indictment is —.

H. A. J. Bowman, Foreman.

[fol. 41] IN UNITED STATES DISTRICT COURT

MOTION TO ARREST JUDGMENT—Filed Oct. 18th, 1924

Now comes the defendant Meyer Selzman, one of the defendants in the above entitled and numbered case, against whom a verdict of guilty was rendered in said cause on the 14th day of October, 1924, and moves the Court to arrest judgment against him and hold for nought the verdict of guilty rendered against him for the following reasons:

Because Section 4 of the Act of October 28, 1919, otherwise known as The National Prohibition Act, or the Volstead Act, is the section of the said Act to which the indictment in the above cause relates and, because the aforesaid Section relating to the sale of denatured alcohol for beverage purposes and imposing a penalty for such sale is unconstitutional for the reason that Congress had no authority to enact such provision of the said section of the said Act and because no authority for the enactment or enforcement of such provision can be found in the Constitutional laws of the United States, and the indictment herein is therefore null and void and of no effect as is likewise the verdict in this case.

B. H. Schwartz, J. C. Bretienstein, G. J. Pilliod, Attorneys for Meyer Selzman.

[fol. 42] IN UNITED STATES DISTRICT COURT

MOTION TO ARREST JUDGMENT—Filed —— —, 1924

The defendant, Meyer Selzman, having heretofore filed his motion in the above entitled and numbered cause to arrest judgment therein, and again moving this Honorable Court to arrest judgment, sets forth and alleges this additional ground for such motion:

That Title III of the National Prohibition Act and the regulations relating to the manufacture and distribution of industrial alcohol prescribed by the Commissioner of Internal Revenue pursuant to the provisions of Title III of said National Prohibition Act which, it is alleged, this defendant conspired to violate, are unconstitutional and not within the power of Congress as granted by the Eighteenth Amendment, nor within the terms of the National Prohibition Act as enacted by Congress, and that the said Title III of the said Act and the regulations aforesaid derive no authority or validity from any constitutional source or any valid statute or law of the United States and that the Commissioner of Internal Revenue was and is without authority derived from any constitutional or any other source to prescribe such regulation.

J. C. Breitenstein, G. J. Pilliod, B. H. Schwartz, Attorneys for Meyer Selzman.

[fol. 43] IN UNITED STATES DISTRICT COURT

SENTENCE (#4172)—October 21, 1924

This day came the United States Attorney on behalf of the United States and also came the defendant, at the bar of court, accompanied by counsel. And said defendant having heretofore been tried and found guilty as to the first count of the indictment herein, and the Court having inquired of said defendant if he had anything to say why sentence should not be pronounced upon him, upon the verdict of guilty heretofore returned herein against him, and having received his reply thereto.

It is now ordered that said defendant be imprisoned in the United States Penitentiary, Atlanta, Georgia, for a period of Two (2) years, and that he pay a fine to the United States of America, in the sum of $500.00. It is further ordered that said defendant stand committed until said fine is paid.

[fol. 44] IN UNITED STATES DISTRICT COURT

SENTENCE (#4206)—Oct. 21, 1924

This day came the United States Attorney on behalf of the United States and also came the defendant, at the bar of court. And said defendant having heretofor been tried and found guilty as to the

second, third, fifth and sixth counts of thei ndictments herein, and the court having inquired of said defendant if he had anything to say why sentence should not be pronounced upon him, upon the verdict of guilty heretofore returned herein against him, and having received his reply thereto,

It is now ordered that said defendant be imprisoned in the Dayton Workhouse, Dayton, Ohio, for a period of Six (6) Months, on the second, third, fifth and sixth counts of the indictments herein) and tion of sentences imposed upon this defendant in cause No. 4172, Criminal, in this Court, and for a like period of six months on each of the third, fifth and sixth counts herein, the term of sentence on each of said three counts to commence at the expiration of the term of sentence imposed upon the count herein immediately preceding in number.

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER SUSPENDING EXECUTION OF SENTENCE—Oct. 21, 1924

Judgment having hitherto been pronounced upon the verdict herein rendered, it is now made to appear to the satisfaction of the court, that the wife of said convict will be confined in childbirth in due course at a time approximately January 20th, 1925, for this reason it is ordered that execution of the sentence and judgment herein be suspended until the first day of April, 1925, unless for good cause shown, operation of this order shall be by the court set aside and this order vacated.

This order except as above provided shall go into effect and operate contingent upon said convict entering into a recognizance in the sum of $5,000.00 with sufficient surety, conditioned that he abide by such further orders which may be made by the court respecting the operation of this order and shall on or before noon of the first day of April, 1925, surrender himself to the Marshal of this Court to abide the judgment in this cause heretofore rendered.

[fol. 46] IN UNITED STATES DISTRICT COURT

MOTION FOR A NEW TRIAL—Filed Oct. 22, 1924

Now comes the defendant, Meyer Selzman, and moves the Court to set aside the verdict of the jury and grant a new trial therein for reasons following:

1. Said verdict is against the weight of the evidence.

2. Said verdict is contrary to law.

3. The Court erred in his charge to the jury, in the particulars to which the defendant at the time excepted.

4. The Court erred in refusing to instruct the jury as requested by the defendant.

5. The Court erred in the admission of testimony offered by the Government against the objection of the defendant, in the particulars to which the defendant at the time excepted.

B. H. Schwartz, J. C. Breitenstein, G. J. Pilliod, Attorneys for Meyer Selzman.

[fol. 47] IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY SENTENCE—Filed Oct. 22, 1924

Now comes Meyer Selzman, one of the defendants in the above entitled cause and moves this Honorable Court to modify and revise its sentence imposed upon him and to impose a sentence not to exceed the maximum penalty allowed by law for violation of Section 37 of the Criminal Code of the United States for the reason that the offenses set forth in the various counts of the said indictment constitute but one offense in contemplation of law, and are therefore subject to but one penalty and second because the sentence imposed by the Court is a violation of Article 2 of the Constitution of the United States, in this, that it is cruel and unusual.

J. C. Breitenstein, G. J. Pilliod, B. H. Schwartz.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—January 19, 1925, nunc pro tunc

It appearing that the action of the court in this case taken in a memorandum filed as of October 27, 1924, was not then journalized, it is ordered that there be entered nunc pro tunc, this order:

This cause coming on to be heard on the motion of defendant, namely, for new trial, in arrest of judgment, and for modification of sentence, the same were severally heard and submitted and the court having considered the same, finds no one of said motions well taken and does overrule each of said motions to which action of the court, as to each thereof, the defendant, Meyer Selzman, is allowed an exception.

..

[fol. 49] IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed Oct. 27, 1924

KILLITS, J.:

Meyer Selzman, with three others, was indicted in Case 4172 for conspiracy "to commit an offense against the United States, to-wit, to wilfully, unlawfully, knowingly and feloniously violate the—Na-

tional Prohibition Act, particularly Title III thereof, and the regulations relating to the manufacture and distribution of industrial alcohol," pursuant to Provision Three of the National Prohibition Act; and particularly Article 108 of the regulations, "in that they, being then and there dealers in completely denatured alcohol, would knowingly, wilfully and unlawfully sell and offer for sale completely denatured alcohol in packages containing less than five wine gallons, without having affixed to said package a label or labels," in violation of the provisions of Title III of the Act, and of the regulation, whose pertinent terms were pleaded.

There was a second count to this indictment. A demurrer was interposed to each count, sustained as to the second. To the first, the objection was made that the indictment does not charge a violation of any statute of the United States; and further, that it is vague and indefinite, and does not set forth sufficient facts to enable the defendant to assert properly his defense.

This demurrer, on the authority of Rudner v. United States, 281 Fed. 516; Robilio v. United States, 291 Fed. 975, and cases cited, was overruled.

Selzman was also indicted in Cause 4206, on seven counts, with the same defendants as in 4172. The first, fourth and seventh are now out of the case. The other four charge separate incidents of sale of denatured alcohol "under circumstances from which the said defendants being then and there the sellers of said amounts of denatured alcohol might reasonably have deduced the intention of such [fol. 50] purchaser to use said denatured alcohol for beverage purposes, contrary to the provisions of the National Prohibition Act," the counts in question each raising the inhibitions of the last paragraph of Section Four, Title II of the National Prohibition Act. A demurrer, overruled, was interposed to each count, on the theory that Section Four of the Act is unconstitutional, because Congress had no authority to enact such provision under the Eighteenth Amendment, or otherwise. The defendant was convicted on the first count of Cause 4172, and on the four standing counts of Cause 4206. During the trial practically all of the exceptions saved were based upon the theories underlying the several demurrers, we are now confronted with a motion for a new trial, and in arrest of judgment, and to modify sentence, the defendant having been sentenced upon each count seperately as a distinct offense.

The motion to modify is based on the theory that the offenses set forth in the various sale counts of Cause 4206 constitute but one offense in contemplation of law; and, therefore, subject to but one penalty. It is urged also that the sentences imposed are in violation of the Constitution, in that they are cruel and unusual. The sentences are the usual workhouse judgments (maximum) provided for a sale of intoxicating liquor. Section Four of the National Prohibition Act provides that the sale of non-beverage alcohol, under the circumstances of this case, and as alleged in the several counts of indictment 4206, shall subject the offended to the penalties provided by Section 29. That Section says that the sale of liquor contrary to law shall bring about, as a maximum penalty for the

first offense, imprisonment for six months in a workhouse, with the alternative of a fine. Barring the consideration of what is included in the term "liquor" in Section 29, which will be had later in this opinion, the motion to modify the sentence can be and is dismissed with but a brief comment. If it is a violation of the law to sell denatured alcohol under circumstances suggesting that the purchaser [fol. 51] is to use it as a beverage, every sale is a separate offense, carrying with it, in the discretion of the Court, the extreme penalty. The theory of the motion seems to be that the law strikes at a practice. That is not so. The law condemns an act. Both the indictment and the facts show that the sales involved were on separate occasions and times, and to several individuals as the respective purchasers.

The defendant, a registered pharmacist, as the testimony tended to show, established a practice in his drug store, by instruction to his clerks, and through his own example, to sell denatured alcohol without the poison label, and in violation of the regulations, to any one whose clothing and appearance indicated that he was derelict, and, presumably, with such a low social standing that injury to him would not likely to excite active investigation. Several of Selzman's customers of this character died of alcoholism shortly following their purchases, including one of the purchasers pleaded as such in one count. A claim that to inflict the extreme penalty on each one of these aggravated sales, under circumstances such as these, is cruel and unusual, carries its own answer. It would have been travesty not to have given such a calloused indifference to human suffering the extremest consideration. Death ensuing, with proof of the corpus delicti presented, the situation would have been at least manslaughter at common law, and, by Ohio statutes, murder in the second degree.

Taking up the remaining questions in 4172, we note, first, that it has long been settled that Congress may direct an administrative bureau to establish regulations to carry legislation into effect, and that such regulations have the force and effect of law. Congress may go farther, and provide that a violation of such regulations shall constitute a criminal offense punishable as defined by the statute. United [fol. 52] States v. Grimaud, 220 U. S. 506. The regulation in question was promulgated in pursuance of the direction of Section 13, Title III of the National Prohibition Act that the Commissioner of Internal Revenue should issue regulations respecting, among other things, "the distribution, sale, export and use of alcohol (industrial) which may be necessary, advisable or proper—to prevent diversion of the alcohol to illegal uses." Given the right of Congress to confer upon the Commissioner the duty of devising necessary regulations, and, noting, as we must, that the provision for a label advising the lethal character of the liquid for internal use is a wise provision to prevent diversion of the alcohol to illegal uses, the conclusion is inevitable that a violation of the regulation is an offense against the United States, even if, in itself, not one punishable directly. Section 37 of the Criminal Code, making it a crime to conspire to commit an offense against the United States, covers just such a situation. The Supreme Court, in Haas v. Henkel, 216 U. S. 462, 479, said: "The Statute is broad enough in its terms to include any conspiracy

for the purpose of impairing, obstructing or defeating the lawful function of any department of the Government." United States v. Foster, 233 U. S. 526.

But it is claimed that the entire Title III of the National Prohibition Act is unconstitutional, because, prior to this legislation, Congress, to protect the revenue, had enacted certain laws govering the manufacture and sale of industrial alcohol under the tax powers of Congress, and that, when the tax interest of the government ceased, the government control of the product ceased.

We get from the brief:

"The enactment of the Eighteenth Amendment and the Volstead Act developed a situation which Title III was intended to solve, and the Government then dealt with the problem of industrial alcohol, not only from the viewpoint of its taxing power, but also from the viewpoint of its control over beverage alcohol.

[fol. 53] Provision is made for the manufacture, withdrawal and preparation for sale and denaturation of alcohol, and no one could reasonably doubt the jurisdiction nor the authority of the Government on these subjects, nor the power of the Commissioner to lawfully regulate on these subjects within the scope of his jurisdiction. Now it is provided that the tax is collected by the Government at the source of manufacture or denaturation. When alcohol, in its industrial form, leaves the Government control, the tax has been paid, and the tax interest of the Government ceases from that moment. Being denatured, it is a poisonous product, not fit for beverage purposes, within the meaning of the Eighteenth Amendment and the Volstead Act, and Governmental control over it as a beverage must cease from that moment also."

This argument proceeds on the theory that non-beverage intoxicating liquor cannot be the subject of legislation in an effort to make effective the direction of the Eighteenth Amendment that Congress should pass "appropriate" laws to restrain the sale of intoxicating liquor as a beverage, and this argument, applicable to the situation in Cause 4172, brings us around to the position taken by defendant's counsel in 4206, there contending by demurrer, and the subsequent motions above referred to, that any provision making it an offense under the Amendment to sell non-beverage intoxicating liquor for beverage purposes is unconstitutional. Counsel well say, in the paragraph above quoted from their brief, that the enactment of the Amendment developed a situation which Title III of the National Prohibition Act was intended to solve; and it was apparently the judgment of Congress that it should deal with the problem of industrial alcohol, not only "from the viewpoint of its taxing power, but also from the viewpoint of its control over beverage alcohol."

Of course, counsel are right in the statments quoted from their brief that "regulations made by the Department of the United States Treasury, in pursuance of Congressional legislation, lose their force and effect as law when they go beyond the scope of the law itself. They are strictly construed as against the Government, although in themselves reasonable."

[fol. 54] The question then is whether it was "appropriate" legislation for Congress to include in the National Prohibition Act provisions intending to strike at the diversion of industrial alcohol to beverage purposes. Several well settled principles control our construction, as to its validity, of legislation born of an attempt to make effective a purpose. These were briefly considered, with citations, by this court in Price v. Russell et al., 296 Fed. 263. These formulae are:

The Amendment clothes Congress with police power, inherent in the enjoyment of which is the authority to legislate effectively, to make successfully operative the Amendment, and in so doing, it may prohibit acts otherwise and theoretically innocuous.

This power is so comprehensive that it includes in its legitimate application, the control and regulation of all means by which the evil sought by it to be repressed may have operation.

It is presumed that Congress attempted to meet the injunction of the Amendment in the enactment of "appropriate" legislation by legislation which might work to a complete and effective repression of what the Amendment treats as a public evil.

The exclusive right is in Congress to judge the means to effect a constitutional purpose, as well as the necessity which calls forth the employment of such means, and its judgment must stand unless the courts are able to see, too clearly to be subject to reasonable criticism, that its action is improvident and beyond legislative limitations.

Applying these propositions, we see no ground for argument that the attempt to prevent a diversion of industrial alcohol for beverage purposes is beyond the constitutional power of Congress. If such alcohol is in fact intoxicating, which no one can deny, and if, in spite of its poisonous character, people might use it for beverage [fol. 55] purposes, which proof in this case establishes as more than a possibility, clearly to reach such a situation was as much within the power of Congress, in its attempt to pass appropriate legislation, as to prevent the sale of beverage intoxicating liquor.

Finally, counsel for the defense direct attention to Section 1 of the Volstead Act, which reads as follows: "The word liquor, or the phrase intoxicating liquor, shall be construed to include alcohol, whiskey, rum, gin, beer, ale, porter, wine, and in addition thereto, any spirituous, etc., liquor liquids, and compounds,—containing one-half of one per centum or more of alcohol by volume, which are fit for beverage purposes." It is argued that because denatured alcohol is a non-beverage intoxicant, it is excluded from the operation of the Volstead Act by virtue of this definition, in which we emphasize the word "include." We feel that the statute cannot be read to mean that the word "liquor" or the phrase "intoxicating liquor" shall be construed to cover only the enumerated liquids, and to exclude any other intoxicating liquor. The obvious purpose of Section 1 is to bring within the operation of the statute beverage intoxicants under whatever guise or name, and to define the quantum of alcohol whose presence will determine intoxicating character for

the law's purposes. The section is inclusive and definitive of certain classifications, but not necessarily does its language purport to cover the entire field of intoxicants. To so hold would be to say that Congress failed to legislate practically and effectively on a subject which had had fullest consideration.

We are unabe to see any question of constitutionality raised here at all, because it is plain, as we have attempted above to show, that Congress might legislate to include alcohol of non-beverage character. The argument, if any, is nothing more than that there is an inconsistency between the definitive section, 1, and Section 4, which attempts to provide for the punishment of any one selling [fol. 56] non-beverage intoxicants, not enumerated in the first section, as included in the term liquor or the phrase intoxicating liquor. What the Amendment struck at is plain: an evil that is aggravated, not different in quality compared with that resulting from the use of beverage intoxicants, if produced by indulgence in non-beverage liquors of intoxicating force. But this inconsistency is not here when we consider, as above, that Section 1 does not pretend to exhaust the category of liquors, the sale of which for beverage purposes may be offensive as crimes violating the purpose of the Amendment. Statutes should be construed practically, if reasonably possible, that their purpose might be effectuated, with only such limitation of application by construction, short of completely reaching the object, which the character of wording compels. It follows that the word "liquor," wherever its sale for beverage purposes is denounced, should be construed as that liquor which is intoxicating in fact or by legal definition, whatever may be its palatability. This view disposes of a question not raised in argument in this case, but privately by counsel for the government, whether, in the Penal Section 29, of Title II of the Act, in the case of a first offense, involving the sale, for known beverage purposes, of non-beverage intoxicating liquor, the punishment is that provided for a sale of "liquor," with an alternative judgment of fine or imprisonment, or for a fine only, as for an offense for which a specific penalty is not provided. We hold that the offense is subject to the same penalty as if the sale were of a beverage liquor.

Only because these matters have been argued so earnestly by counsel, who enjoy and are entitled to the respect of this Court, do we carry this discussion to this length. The questions raised really seem somewhat fanciful, having regard not only to the practicality of the situation, but to the consistent current of decisions, some of which are cited in Price v. Russell, supra.

John M. Killits, Judge.

Oct. 27, 1924.

[fol. 57] IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed Jan. 19, 1925

KILLITS, J.:

In passing on certain motions in these cases the court expressed its views there raised in a memorandum filed October 27, 1924. In the first case the defendant was sentenced to the penitentiary for violation of Section 37 of the Criminal Code, conspiracy; in the second case, he was sentenced to several terms to be consecutively served in a workhouse, service to commence at the expiration of the penitentiary sentence imposed in cause 4172.

In the first case the alleged conspiracy consisted of an agreement to violate a regulation respecting the sale of denatured alcohol. In the second case, while raising the same question as to the jurisdiction of Congress to authorize regulations governing the sale of tax paid alcohol for industrial purposes, the additional point is made, and overruled by the court, that Congress was without power to include in the National Prohibition Act a penalty for the sale of denatured alcohol for beverage purposes.

The cases were tried together. The evidence against the defendant was clear and conclusive, hardly open to dispute. Practically the only defense was the denial of the defendant of criminal intent, which was met by a superabundance of proof to the contrary. The defendant was promptly sentenced, but on account of a domestic situation, execution of the sentence was suspended until the first of April by the consent of the United States, through the District attorney the convict being enlarged on bail to expire with March 31, 1925. We are now asked to admit convict to bail and upon supersedeas pending proceedings in error in the Supreme Court of the United States. This we have declined to do. As the Court said in the opinion of October 27, the contentions to be submitted for [fol. 58] review seem to be extremely fanciful. As to the first case, No. 4172, involving imprisonment in the penitentiary, we are unable to see any ground for argument at all. The second case involves some measure of construction of the National Prohibition Act. Whatever prospect of successful issue to the convict in the Supreme Court there is in the whole record, seems to this court to abide in a consideration of the second case, 4206. Whatever relief convict will get from the judgment of this court will come in that case if at all. The term of imprisonment imposed in the first case affords ample time in its service for a presentation and a determination of the questions in the second case by the Supreme Court.

We therefore have declined to enlarge the convict pending proceedings in error.

John M. Killits, Judge.

January 19, 1925.

[fol. 59] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed Oct. 22, 1924

To the Honorable John M. Killits, one of the Judges of said Court:

Now comes the defendant, Meyer Selzman, and says on the — day of October, 1924, this Court entered judgment in favor of plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in said case certain errors were committed, to the prejudice of this defendant, all of which in more detail will appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error in his behalf may be issued to the United States Supreme Court for the correction of the errors so complained of, which errors so complained of fall within the provisions of Section 238 of the Act entitled "An act to codify, revise and amend the laws relating to — judiciary," approved March 3, 1911, Chapter 231, and that a transcript of the proceedings and papers in this case, duly authenticated, may be sent to the United States Supreme Court.

B. H. Schwartz, J. C. Breitenstein, G. J. Pilliod, Attorneys for Meyer Selzman.

I hereby acknowledge service of the within petition for a writ of error and a copy of the assignment of errors above mentioned this 21st day of October, 1924, and hereby enter the appearance of the United States of America herein in this proceeding.

D. L. Sears, Assistant United States Attorney.

[fol. 60] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Oct. 22, 1924

Now comes the defendant above named, Meyer Selzman, and filed with his petition for a writ of error herein the following assignment of errors in the above entitled case, on which he will rely in his proceedings on a writ of error, if one be allowed herein. The said Meyer Selzman, who will be plaintiff in error in said proceedings in error in the United States Supreme Court, says that in the record and proceedings in the above entitled matter there is error manifest on the face of the record in the following respects:

1. In overruling the demurrer of defendant heretofore filed, which appears in the record;

2. In overruling the motion of the defendant at the close of the Government's case, which appears in the record;

3. In overruling the motion of defendant at the close of all the testimony, which appears in the record;

4. In overruling the motion of defendant to arrest judgment, which appears of record therein;

5. In overruling the motion of defendant for a new trial and to each ground thereof, to which defendant duly excepted;

6. The Court erred in his charge to the jury, as appears of record herein.

The defendant says that each of the foregoing errors was prejudicial to his substantial rights and he therefore prays that the judgment of said District Court of the United States for the Northern District of Ohio, Western Division, be reversed, and the defendant be restored to all things he has lost by reason thereof.

J. C. Breitenstein, B. H. Schwartz, G. J. Pilliod, Attorneys for Meyer Selzman.

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Jan. 19, 1925

This 19th day of January, 1925, came the defendant, Meyer Selzman, by his attorneys duly authorized, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and his assignment of errors intended to be urged by him, praying also that a transcript of record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and various proceedings may be had as may be proper in the premises.

On consideration thereof the Court hereby allows the writ of error prayed for.

This cause coming on further to be heard upon the application of defendant to be admitted to bail and upon a recognizance in supersedeas, said application is denied for reasons set forth in a memorandum filed this 19th day of January, 1925, to which action of the court denying said application, an exception is allowed said defendant, Meyer Selzman.

John M. Killits, U. S. District Judge.

January 19, 1925.

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER FOR BOND ON APPEAL—Jan. 31, 1925

The petition of Meyer Selzman for writ of error to the Supreme Court of the United States in the above entitled case having heretofore been allowed, it is ordered that the defendant herein give a bond in the sum of $250.00 to act as security for costs.

J. M. K., Judge.

January 30, 1925.

[fol. 63] BOND ON WRIT OF ERROR FOR 250; approved and filed February 24, 1925; omitted in printing

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[fol. 64] IN UNITED STATES DISTRICT COURT

No-. 4206, 4172, Consolidated

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Western Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America as plaintiff, and Meyer Selzman as defendant, a manifest error hath happened, to the great damage of the said Meyer Selzman, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 26 day of January, in the year of our Lord one thousand nine hundred and twenty-four and of the Independent of the United States of America the one hundred and forty-eighth.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by C. B. Watkins, Deputy Clerk.

Allowed by John M. Killits, District Judge.

[fol. 65] IN UNITED STATES DISTRICT COURT

No-. 4206, 4172, Consolidated

[Title omitted]

RETURN

In obedience to the within writ, I herewith transmit to the United States Supreme Court a true and complete transcript of the record

and proceedings in the foregoing entitled cause this 12 day of March, A. D. 1925.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by C. B. Watkins, Deputy Clerk.

[fol. 66] CITATION—In usual form, showing service on James M. Beck; omitted in printing

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[fol. 67] IN UNITED STATES DISTRICT COURT

PRÆCIPE OF HARRY PORTER—Filed Oct. 10th, 1924

To Miles E. Evans, Assistant United States Attorney, Toledo, Ohio.

DEAR SIR: I hereby respectfully request that I may be allowed and permitted to be sworn and testify on behalf of the United States, in the trial of the above entitled cause, and to tell the truth therein so far as I have knowledge relative to the facts in said case.

I hereby waive any and all rights and privileges and immunity which I may have under the Constitution and statutes of the United States, and under the Constitution and Statutes of any of the several states, of which I am a citizen, or wherein I reside at the present time.

Please take such steps as are necessary in order to permit me so to testify under the terms and conditions as aforesaid.

Respectfully yours, Harry Porter.

[fol. 68] IN UNITED STATES DISTRICT COURT

Criminal Cases Nos. 4172 and 4206

[Title omitted]

BILL OF EXCEPTIONS

CAPTION

Be it remembered that on the trial of the above-entitled cases in the District Court of the United States for the Northern District of Ohio, Western Division, at the October, 1924, term thereof, before the Honorable John M. Killits a judge of said court, and a jury duly empaneled and sworn, the following proceedings were had:

Trial commenced October 9, 1924.

APPEARANCES OF COUNSEL

On behalf of the government, M. E. Evans and D. L. Sears.

On behalf of the defendant Selzman, Joseph C. Breitenstein, Attorney at Law, 1136 Guardian Bldg., Cleveland, Ohio; Gerard J. Pilliod, Attorney at Law, 1136 Guardian Bldg., Cleveland, Ohio, and Benjamin H. Schwartz, Attorney at Law, 7th floor Guardian Bldg., Cleveland, Ohio.

On behalf of the defendant Bracker, Royal B. Binzer, Attorney at Law, 1141 Nicholas Building, Toledo, Ohio.

MEMO. OF COURT ON DEMURRERS

The Court: Before this jury is sworn, I think the court should pass on the demurrers here, so that there will be no question about the matter. There are demurrers to the two indictments on three grounds. These are purely legal questions.

The first ground is that the indictment does not charge a violation of any statute of the United States. The demurrer in each instance is overruled, and as to each count on that ground, without comment. [fol. 69] The second ground is that the indictment is vague and indefinite and does not set forth facts sufficient to enable the defendants properly to assert their defense. The counts in these indictments charging conspiracy are counts in terms which have been approved by a very consistent and extensive list of cases in the reviewing courts.

The counts other than the conspiracy counts, the sale counts, come to the court without the benefit, so far as we know, of a previous adjudication. These charges are in the words of the statute. There have been, however, recently, some decisions on that question which have indirect influence. Just recently,—the title of the case has escaped my memory,—our own Circuit Court of Appeals has commented upon the alleged vagueness of an indictment charge, and concluded its comment in favor of the government upon the theory that there was available every time in such case as that opportunity to ask the court for a bill of particulars; and that, superficially, at least, the indictment was good in the words of the statute to put the defendant on trial. We are not prepared to say that a bill of particulars would be ordered, had it been asked for in time. It is too late, under the practice, to ask one now. We have not had occasion to go over that phase of the practice. But clearly, with the opportunity for a bill of particulars once enjoyed by the defendant, we think these various counts effectively pleaded.

An interesting question,—one of first impression so far as we know, and we judge that must be the case from the character and extent of the brief offered,—is set up in the amendment to the demurrer alleging the unconstitutionality of the section and clause of the statute under which all these charges are attempted to be based; and we are called upon to interpret the first section of the Volstead Act. Of course, in the performance of that duty, we must consider

it in pari materia with the constitutional provision under which Con-
[fol. 70] gress had the power to write the statute, and with other terms and other pertinent sections of the Act, including the last clause of Section four, which is directly attacked. In this brief and not very carefully digested opinion, I shall not attempt to cite any authorities at length, nor to go into an extensive discussion of the rules which govern it.

Prior to the enactment of the constitutional amendment, the subject matter of the enactment was exclusively for state consideration. It involved the exercise of the police power; and it is well understood that in the division of the functions of our government, Congress has no police power over any subject which is enjoyed by the state, no concurrent police power on any subject, unless the Constitution so particularly and specifically provides. The police power of the government is limited to the enforcement of those laws which the Constitution permits Congress to pass, and the United States has no general police power, such as the states enjoy.

The Eighteenth Amendment was an attempt to give Congress police power over the subject of traffic in intoxicating liquor. It is quite obvious,— and it is fundamental, it seems to me,—that when once the people clothe Congress or the United States with police power to be exercised concurrently with the states, the United States has the same broad opportunity for legislation to make that police power effective, as that enjoyed by the states themselves. It, of course, will be utterly incongruous, inconsistent and ridiculous to say that the United States and the several states enjoy concurrent power to prohibit certain offenses and practices, and that the breadth of legislation by state legislatures is greater than that enjoyed by Congress. Any such holding as that would destroy the force of concurrent opportunity in effect, if not directly so, and such is the result of the decision by the Supreme Court in the National Prohibition Cases.

[fol. 71] Back in the period of Wheaton's Reports, in McCullouch v. Maryland, it was held that when the general government enjoyed an opportunity to exercise police power, Congress was clothed with legislative power to write laws to the limit of reasonable necessity to make that power effective. This decision has been followed by subsequent decisions down to the present time. It might write as offenses practices theoretically innocuous, if indulgence in those practices made ineffective attempts to enforce the police power. The books are full of discussions of that subject.

Another principle lost sight of, especially in this time when there is some discussion whether there should not be a remodeling of the Constitution by depriving the courts of their relationship to the stability of constitutional legislation, is this: The courts consistently have held, in their jealous regard for the rights of Congress, that Congress in the first instance, is clothed with the power to determine what is necessary in the shape of legislation to carry out its powers; that the question whether or not any particular practice is necessary to be prohibited in order that the legislative intent may be carried out, is a question for Congress and not for the courts. It

is one of those instances lost sight of in the general and somewhat extravagant construction of the alleged arbitrariness of courts, where the courts have shown their regard for their own limitations, limitations of the judicial function, and their intention to uphold the legislative functions to the fullest practicable extent.

These are some of the fundamental considerations which underlie and control an interpretation of this particular statute. The Eighteenth Amendment says that, among other things, the traffic in intoxicating liquors for beverage purposes shall be prohibited. I may not quote it exactly, but that is substantially the language of the [fol. 72] Amendment. I do not have it here. The traffic, manufacture and sale of intoxicating liquors for beverage purposes shall be prohibited. Now Congress is empowered by the Second Section of the Amendment to enact appropriate legislation. I think that is the word: appropriate legislation to carry this constitutional inhibition into effect.

It is presumed that Congress approaches its duty in an effort to perform it fully, and we must start here with that presumption. The courts will be assuming authority and power that would be arbitrary if we did not so start with it; that Congress meant, in the enactment of the so-called Volstead Act to cover the entire field of possibilities reasonably practicable in an enforcement act. That is, Congress was attempting to pass an Act that should make the selling of any liquor that was intoxicating liquor, if that sale were for beverage purposes, an offense.

The First Section of the Act, and that is the section that is presented for first consideration at least, although it is not the section attacked as unconstitutional, provides that the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine," and I am going to stop the quotation there to observe that this enumeration covers the commonly accepted intoxicating liquors, those generally known in the trade and in the life of the people as intoxicating liquor. There are a number of other liquors commonly used by some sections of our people for intoxicating liquor that are not in common acceptance or knowledge. Only yesterday we had to deal with a man of Oriental extraction. He was charged with selling intoxicating liquor known principally to Syrians and to people from the Eastern Mediterrean. Clearly, because Congress enumerated liquors which Anglo-Saxons know to be intoxicating, and did not name this Mediterranean intoxicant, it could not be said that to sell it was within the statutory inhibition.

[fol. 73] Then, in this definition of what construction shall be placed upon the words liquor or intoxicating liquor, the legislation proceeds: "in addition thereto * * * by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for beverage purposes." Now I think it is reasonable to assume the Congressional intent there to prevent disguising by other names intoxicants, and those which were commonly known as intoxicants before the Act was passed. Beverage liquors which do not come within the enumeration of beverage liquors as commonly un-

derstood are also brought in. The crux of the question here is whether this section shall be construed as inclusive or exclusive; inclusive only of those which are named, so that there would be no question of definition respecting that field of intoxicants; or whether, in defining that field, Congress has fallen into what seems to be a grave error, that of excluding from the operation of the Amendment those intoxicants which ordinarily are not fit for beverage purposes, but which have intoxicating capacity, if so used. One construction conforms to the requirements that such interpretation shall be placed upon the Act as will be consistent with the duty and evident purposes of Congress to complete its powers derived from the Amendment. The other construction requires the thought that Congress has neglected the full performance of its duty, and has left open a mischievous field, and opportunity to purvey intoxicants, however, unpalatable they might be, without any punitive result.

It seems to me that such a construction as the latter would be an unreasonable one. Certainly it is not forced by the language of this Act. That language is that the words intoxicating liquor shall be construed to include. There is no necessary inference that when there is an enumeration of what shall be included in a phrase, intoxicating liquors not named shall be excluded, when the purpose of the Act is to cover the field of intoxicants.

[fol. 74] When we go back again to the fundamental law, that of the Constitution, we find that Congress is directed by the Constitution to pass a law making the prohibition of the sale of intoxicating liquors broadly effective; and the question then is, whether it can pass a law which makes it an offense to sell consciously a non-beverage intoxicating liquor for beverage purposes, to sell conscious, directly or constructively, that it is to be used for beverage purposes, such a non-beverage as wood alcohol or denatured alcohol.

We think that Congress had that power. We think we are forced to hold that it had that power; that the real question is not so much that the exercise of the power was beyond the scope of the Amendment—we clearly think it is within the Amendment—but whether the latter part of Section 4, in its provision against the sale of these non-beverage intoxicants for beverage purposes, is inconsistent with the definition in Section 1. We do not think it is. We construe that definition as not exclusive; and for these reasons, this demurrer shall be overruled, with exceptions to each count, and as to each indictment. The record, when being made up, will show that this ruling of the Court was had before the pleas to the indictment. There is no question about that.

The Court: You may swear this jury.

Jury sworn.

ARGUMENT OF COUNSEL

Opening statement made to the jury by counsel on behalf of the government.

Mr. Breitenstein: At this time, we desire to make a motion to discharge the defendants upon the facts related by the district attorney to the jury, as to what he states the evidence will show. It is our contention that the testimony which he said will be brought forth here by the government will not prove a violation against any law of the United States, and we desire to add in connection with my statement [fol. 75] all of the reasons in support of this motion that were set forth in the brief in support of the demurrers. For instance: Mr. Evans has said that the analysis of the city chemist and of Mr. Kneeland will show and does show that the contents of the bottle which was analyzed by them to be completely denatured alcohol. It is the contention of the defense that completely denatured alcohol is not fit for beverage purposes; and inasmuch as the Eighteenth Amendment prohibits the sale of intoxicants for beverage purposes, and the Volstead Act defines and construes what intoxicating liquor is, and since completely denatured alcohol is a compound, and since the definition of intoxicating liquor states that compounds and all liquors which are to be considered to be intoxicating must be fit for beverage purposes, we urge Your Honor to sustain the motion.

The Court: The ground of the motion is precisely the same as the demurrer.

Mr. Breitenstein: Substantially, yes. We want to add that in view of the statement—he states that the evidence will show that it was completely denatured alcohol. It is not fit for beverage purposes. We want to add those allegations to the matter they set forth in the indictment.

The Court: I paid not very close attention to what Mr. Evans said. But I call attention to one very concrete and definite statement of proposed fact which he made to the jury, which involves the alleged sale of denatured alcohol without the lawfully required label. Of course that would be a concrete offense *in* the statute covers that sort of transaction at all.

The Court: Motion overruled; exception.

Mr. Pilliod: I spoke to the district attorney with regard to count two of the indictment. The district attorney is willing that that count be withdrawn now from the Jury, in view of the fact that the same facts are set forth as in 4206. It is duplicitous.

[fol. 76] The Court: My recollection is that the court passed on that question, if not directly, in an indirect way. That count may be stricken from the record.

Opening statement made to the jury by counsel on behalf of the defendants.

Mr. Binzer: I wish to make the same objection that was made by Mr. Breitenstein after the counsel for the government made the opening statement.

The Court: All right. It is saved to you also.

Thereupon, the government, to maintain the issues on its part, called as a witness in its behalf WILLIAM J. MCGUIRE, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sears:

Mr. Breitenstein: I move at this time for a separation of witnesses.
The Court: All right, but federal and state officials as a matter of courtesy are allowed to stay in the court room. Those who are to testify, private citizens, not officers, will leave the room.
Mr. Breitenstein: Those are all that I intended by this motion, Your Honor.

My name is William J. McGuire. On the first day of April, 1924, I was a police officer in the city of Toledo. I know the defendants in this case. Selzman is there in the rear of his counsel.

Mr. Breitentsein: I object to that method of questioning.

(Narrative:) The young man at the corner of the table is Porter. The man at the right end of the table is Bracker; the one at the left, is Liebenthal.

Q. I wish you would tell the jury what, if anything, you know about the offense of which these men are charged?

Mr. Breitenstein: That is too broad.

[fol. 77] Q. What duty were you called to perform about the first of April in the vicinity of Selzman's drug store?
A. I went there in regard to a violation of the National Prohibition Act.

Mr. Breitenstein: I object to that answer. It is unresponsive. The question is in bad form.
The Court: That goes out. It does not fit the question.

(Narrative:. I had occasion to go to Selzman's drug store on that day. It is located at 2002 Canton Avenue.

Q. While there, state what took place and what did you see?

Objection.
The Court: You may state your own active participation, whatever it was.

(Narrative:) Prior to going there I gave a dollar bill and a half pint bottle to a man to go in and purchase a half pint of alcohol. This was done in the police station.

Q. Did officer Gloyd follow this man?

Mr. Breitenstein: Objection, unles he saw, it is a conclusion.
The Court: Did you see it?

A. I did.

(Narrative:) As to who followed him to the drug store; officers Murphy, Howard and myself were in the machine driving along. We parked the machine first on Spielbush Avenue, and then later

we drove over on Woodruff Avenue. We saw the man coming out of the drug store. He was sent in with a dollar bill. We searched him and another man that was with him. The man that we gave the dollar bill to had seventy-five cents in change, three quarters. The other man had a pint bottle which I had given to the other man. I opened the bottle. It contained fluid.

Q. I am handing you a bottle, and ask you to tell the jury, if you know, what it is?

[fol. 78] Objection.

(Narrative:) This is the bottle I took from the man by the name of Ryan; it is also the bottle that I sent into Selzman's drug store. Ryan is the man that went into the drug store. I did not search Ryan before he went into the drug store. This is the bottle I took from Ryan when he came out of the drug store. I did visit the drug store. I took the bottle and went in. Bracker was behind the counter. I told him who we were, and asked him if he sold that. He said he did. The conversation went on in regards to where the money was that was paid for it. We took the dollar bill out of the cash register. It had the serial number on it. We took the serial number down before we went in.

The Court: Did any one make a record of this bill?

(Narrative:) I took the number of the bill and put it on a yellow slip of paper. The slip of paper just handed me is the slip of paper I put the serial number on at that time.

The Court: That contains the number you took off the bill?

A. Yes, sir.

Q. Does the number on the slip of paper correspond with the number on the bill you took from the Selzman cash register?

Objection.

The Court: He may answer that. What was the number?

A. N-49908393-A, Series 1917.

The Court: Did you see the dollar bill afterwards?

A. I did.

The Court: Is that the dollar bill?

A. It is.

The Court: It has the same number on it?

A. Yes, sir.

The Court: The same series?

A. Yes, sir.

The Court: You took it from the Selzman cash register?

A. Yes, sir.

[fol. 79] Q. What else did you find in that drug store, if anything?

Mr. Breitenstein: That is a pretty broad question, Your Honor.

The Court: That is true, but he may answer it.

(Narrative:) We found a very complete list of drugs, as far as I know; also a quantity of alcohol, in all, as I recall, there were about thirteen or fourteen gallons. I would not be positive as to that.

Q. You spoke of seeing the defendant Bracker; did you see any other defendants in the drug store that day?

Mr. Breitenstein: What time?

(Narrative:) Bracker was there, and Porter, when we first went in. Later Selzman came in. We just talked to them with regard to how they were selling this stuff. Bracker said if any one came in well dressed, he was instructed by Selzman to label the bottle, and if they were poorly dressed a label was not necessary.

Mr. Breitenstein: This should be acceptable only against Bracker, not against the others, because it was after the end of the conspiracy, if there was one.

The Court: The jury is instructed to receive that as testimony as against no defendant but Bracker.

Q. Did you have any conversation with Porter?

A. I did not myself, I talked with Bracker.

Q. I will hand you here a paper, and ask you to tell, if you know what it is?

Mr. Breitenstein: The witness should be asked if he ever saw it before, and what were the circumstances.

(Narrative:) The paper you have just handed me is the statement of Martin Bracker made in the police station on April 1, in my presence, and signed by Martin Bracker in my presence. It also bears my signature.

Q. I will hand you another document and ask you to tell, if you know, what it is?

[fol. 80] Mr. Breitenstein: He has gone about this in the wrong way. He has not even brought out that there was a conversation there at the police station, or what the circumstances were.

The Court: That is only a matter of further elaboration. Go on.

(Narrative:) The paper you have just handed me is a statement made by Harry Porter in the police station in my presence. That is his signature. It was made in my presence and it bears my signature also.

Cross-examination.

By Mr. Breitenstein:

Motion that the testimony be stricken out; overruled; exception.

I was talking as a police officer. My first name is William. This that I told about happened on the first day of April, 1921. I did not see Ryan in the police station. I did not say he was searched there. I did not say that he was searched. I said a man,—I did not say that it was Ryan,—I said that another man got a dollar bill. Officers Howard and Gloyd were there at that time; the three of us were there, in the property room of the Central Police Station. I

would not be positive about the time. It was between 9:00 and 10:00 o'clock in the morning, if I remember correctly. I talked to the man to whom I gave the dollar bill. He was told to take this dollar bill and go to the drug store at the corner of Canton and Woodruff and buy a half pint of alcohol. He and Officer Gloyd then left the police station. So far as I know this drug store contained a regular line of drugs. I am not very familiar with drugs. In appearance it was the same as any other drug store. There was nothing whatever about this drug store to distinguish it from any other drug store so far as appearances are concerned.

Q. Do you know whether or not thirteen or fourteen gallons of denatured alcohol is a great deal of alcohol.

[fol. 81] Objection.

The Court: Have you any grounds for an opinion.

A. I have no reason to know how much they should carry.

Selzman refused to make a statement. I have no statement from Selzman. He was not in the drug store at the time I entered—after this man went into the drug store and brought out the denatured alcohol.

Mr. Breitenstein: That is all.

Cross-examination.

By Mr. Binzer:

I did not know the man to whom I gave the dollar bill until the morning he came to the station. I singled him out because he brought information that they were selling alcohol in half-pint bottles without any labels on in a drug store at the corner of Woodruff and Canton. He brought that information in.

Q. And to whom did he give that information?

The Court: Who brought that information in?

(Narrative:) The man who was given the dollar bill gave the information to me. I then got a half pint bottle and a dollar bill, took the number off the dollar bill, washed the half pint bottle out, and put the cork in. I gave the bottle to him with the dollar bill and instructed him to go to the drug store and buy the alcohol. Officer Gloyd followed him to the place. I went over in the machine and I saw them at different times as I was driving over as they were walking. I did not meet this man as he was coming out of the drug store as I arrived at the corner of Canton and Woodruff Streets. I parked my machine first on Steelbush and later on Woodruff between Cherry and Canton. When he was coming down Woodruff Avenue toward Cherry on Canton, I stopped him. I had some conversation with him. I asked him where he got that. He said at the drug store at the corner of Canton Avenue. The man I gave the money to did not have the bottle. Ryan had the bottle. The [fol. 82] man had seventy-five cents in change. When I met this

man, I asked him where he got it. He answered, at the drug store at the corner of Canton and Woodruff.

We then took him back to the drug store and asked him who sold it—Ryan and the other man with him. I asked Ryan which man sold him the half pint. Ryan was the man that purchased the stuff. Then I asked Bracker where the dollar bill was. He seemed a little excited and went to the cash register and here was the dollar bill with the same numbers on it as I gave Ryan. About that time I called up Federal Agent Hasemeyer. I waited at the drug store. I telephoned from the drug store. Officers Murphy, Howard, and Gloyd were with me at the drug store, besides Ryan and this other man.

I asked Bracker who sold that stuff. He said he did. He said he had instructions to sell it in those kinds of bottles. I asked him if he did not label them. He said the instructions were not to label them unless they were well dressed people, and if they were well dressed, to put labels on them.

Q. Did he make any kind of statement to you then in the store?

The Court: Who did he say instructed him?

Objection.

A. Selzman.

The Court: The latter conversation the government is entitled to, as far as Bracker is concerned. It does not include Selzman at all. It involves only Bracker. To whatever Bracker said, in all its ramifications, the government is entitled to.

Mr. Breitenstein: The jury should be instructed——

The Court: The jury understands that it does not come in against Selzman, even though his name is mentioned.

(Narrative:) About that time Officer Hasemeyer came. We went through the back of the place and gathered together a number of bottled containing alcohol, together with some receipt books and register books we found in there regarding the sale of poisons and alcohol. [fol. 83] We got it together and Hasemeyer gave Selzman a receipt for the stuff, and we put it in the patrol wagon, and took it, with the defendants, to the station house. We took them up to the detectives' office and Bracker made a statement. I guess all of us officers, Hasemeyer, myself and Howard questioned him there. I asked Bracker whether he wanted to make a statement or not. I would not say just who asked him the question. I was there when it was asked. We were there questioning him and asking him to tell us what the transaction was. The bunch of us did the questioning.

The Court: What did you say to him; give that in detail?

(Narrative:) I cannot just recall the conversation. We questioned him in regard to the sale of this alcohol; what his instructions were in regard to the sale of this alcohol; what his instructions were in regard to it; who gave him the instructions; whether

he was a licensed pharmacist or druggist. He gave his statements voluntarily. No one there made any threats. None of the officers said they would put him in jeopardy or anything to that effect if he did not make a statement.

One of the stenographers at the police station wrote the statement. I believe his name is signed to it. The statement was taken by an officer of the police force just as Bracker gave it. It was taken without any threats, promises or fear of any kind—of his own free will and accord.

Bracker was questioned about other sales of this stuff besides this one particular one, and how long it had been going on. He gave his answers freely.

After that I got a number of other people in that were sick, and some were in the hospital, to get information. And when somebody was sick from drinking wood alcohol, I would bring them in and get a statement from them, if they were able to give it.

Mr. Binzer: That is all.

[fol. 84] Redirect examination.

By Mr. Sears:

Q. Speaking of obtaining information from hospitals, tell what, if any, information you obtained from hospitals?

Mr. Binzer: Objection.

The Court: Did you not open that door pretty wide yourself.

Mr. Pilliod: I make an objection on behalf of Selzman.

The Court: As to Selzman, it is sustained; as to Bracker it is overruled. Go on.

(Narrative:) I learned that there were a number of men sick at the time in the Municipal Hospital, from drinking denatured alcohol. A number of them died. If I recall the exact number, there was twenty-one died.

Q. And did you learn, in any instance, where this alcohol was obtained?

Mr. Binzer: Objection. I move the former answer be stricken from the record; that which pertains to the number being sick at the Municipal Hospital.

The Court: You asked him, and this is only the logical outcome of that unlocking of the door. Go on.

Exception.

(Narrative:) There was a number of them that gave statements in my presence, stating that they bought this stuff at the corner of Canton and Woodruff. Selzman's drug store is at the corner of Canton and Woodruff.

Recross-examination.

By Mr. Binzer:

I had conversations with some people at the hospital; and some I took to the station, and, seeing that they were sick, later sent them to the hospital. I inquired of them where they obtained this alcohol. They did not know the party's name who sold it to them. They said that the drug store was at the corner of Canton and Woodruff.

Q. Then you do not know that Bracker sold them alcohol?

A. Yes, sir.

[fol. 85] Redirect examination.

By Mr. Sears:

Q. Only that it came from Selzman's drug store, is that right?

A. Yes, sir.

Mr. Sears: That is all.

The Court: It is understood that none of the testimony offered by Officer McGuire is receivable against Selzman, except that much of it which touches his observing this individual coming out of that drug store; and that is general in the whole case. It is not in the case against Selzman; but this equipping of the man Ryan with the means of getting alcohol, and what happened as a result of that, that comes in for the whole case.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf C. E. HOWARD, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is C. E. Howard. I have been a city police officer in the city of Toledo for eight years. I was at Selzman's drug store on or about the first day of April of this year with Officers Murphy, McGuire and Gloyd. I was there in my official capacity as a police officer. The drug store is located at 2002 Canton Avenue, close to Woodruff, on the corner of Woodruff. I do not know the exact time I was there, but it was between 9:00 and 10:00 A. M.

Q. Will you state the occasion of your being there in your official capacity as police officer at this place at that time?

Objection.

[fol. 86] (Narrative:) I did not know a man by the name of James Ryan. I saw him there at that time. That was the first day I ever saw him, the first day of April. I have seen a bank note which looks very much like the one to which you call my attention. The paper which you just showed me is the piece of paper that

Officer McGuire wrote down the serial number on and gave to a man at the police station. This man's name, I do not remember; but that is the bill and that is the piece of paper. The transaction took place on the first day of April, 1924, in the Central Police Station Property Room. Officers Murphy, McGuire, Gloyd and myself were present at that time. After the bill was given to the man, McGuire told the man to proceed to go to this place and buy a half pint of alcohol. The man left the station with Officer Gloyd. He was under my observation after that time, at Steelbush and Jackson Avenues. He was then walking along with another man, a man by the — James Ryan, we afterwards found out. They were walking toward Selzman's drug store from Jackson and Steelbush.

Q. What, if anything, did you observe Ryan or the other man do after that?

Objection: immateriality; overruled; exception.

(Narrative:) I next saw them walking down Woodruff from the drug store. Officer McGuire and I stepped out and searched these two men. I should judge that was about half a block from the drug store. We were sitting in an automobile. We stepped out, grabbed hold of both of them and searched them. On Ryan we found a half pint bottle that we sent him in with. On the other man we found three quarters, out of the change of one dollar that we gave him. The bottle you have shown me we gave this man at the Central Police Station. It is the same bottle that McGuire took away from Ryan when we searched him. That was on the first day of April of this year.

The Court: It was not Ryan you gave the money to?
A. No sir.
[fol. 87] The Court: What was his name.
A. I do not know; as I ——
The Court: What became of him?
A. He was turned loose.
The Court: And you do not know where he is?
A. I do not know.

Mr. Evans: We will show that connection by another witness, I think.

(Narrative:) We took the bottle into the drug store, Ryan and the other man with us. We asked him in the presence of Bracker. Bracker was the first one we saw. The boy that gave his name as Porter was also in the store. We had a conversation with Bracker when we went back into the drug store. He——

Objection.

The Court: It applies only to Bracker; any statement.

(Narrative:) Officers McGuire, Murphy and Gloyd, a man, I do not know his name, and this Ryan, were with me. We asked Ryan to point out the one that sold him the pint. He said, that is the

man there, pointing to Bracker. We asked Bracker if he sold the man the bottle. He said yes. But he said to me that he was selling them under the orders of Selzman; that he was just a clerk there.

The Court: This is only Bracker's statement.

(Narrative:) At that time we asked Bracker where his books were to show these things. He said he did not know anything about the books. He had not been marking them down at all. After a few minutes' conversation with him, he told me, he said, I don't know what to say; I am waiting for Selzman, who ought to be here very soon. I did not talk to Porter at that time; I talked to him later. I asked Bracker about this bill. He said he received it and that it was in the register. He got it out of the register. We compared our notes with the serial number we had taken down previous to that, with the bill we took out, and they corresponded exactly. Then I went to the rear of the store and called up the United States [fol. 88] Officer and told him I wanted him to come over there; I thought it was a case for the government. Hasemeyer came in answer to my telephone call. I don't believe I was there twenty minutes when Hasemeyer came over there. I don't believe Hasemeyer was there over ten minutes when Selzman came in. No one was with Selzman.

I had some conversation with Selzman. I asked him about the sales of this stuff, and while in conversation with him, another man came in by the name of Carter, address all over. He had two half pint bottles in his back pocket. We searched him, in the presence of Selzman and Bracker, and asked what he wanted to do with the bottles. He said he was in to get them filled.

The Court: Selzman was right there?

A. Yes sir.

The Court: Go on.

(Narrative:) I asked Selzman why he did not put the labels on these bottles, or have his clerks do it. He said he did not know anything about it. I asked Bracker, in Selzman's presence, if he asked him to put labels on the bottles. Bracker said he did not. He said, I am working for him and I have to do as I am told to do. That is what he said right in front of Selzman's face.

Q. Did you question this man Carter any further in the presence of Selzman?

A. I did.

(Narative:) I asked Selzman why he did not put the labels on

Q. Did you question this man Carter any further in the presence of Selzman?

A. I did.

Mr. Breitenstein: Objection. There is no evidence that there was a sale.

Overruled; exception.

(Narrative:) We asked Carter what he was in there for. He said to get those bottles filled. I said to him, don't you know that that stuff will kill you. He said he was drinking it a long time and it had not killed him yet. I asked him how many times he was in there to make purchases in that place. He said since last December.

[fol. 89] The Court: Selzman was right there?

A. Yes sir.

Mr. Breitenstein: Objection. If there was a conspiracy, it was consummated previous to the time Carter came in?

The Court: It is in for its interpretative purposes. Go on.

Exception.

(Narrative:) I asked him again which one of the clerks sold him this stuff. He said all of them did, including Selzman, Porter and Bracker. He said he bought it from all three of them. We asked him what he purchased when he brought these bottles there. He said they raised the price. He said at first it cost only fifteen; later they raised it to twenty-five. He said it never harmed him in any way, shape or form, but he did not specify just exactly what it was. We took Carter down to the police station. Later we got a statement from him. I have seen the paper you are showing me, before. That is Bracker's signature. I saw him sign it. The first signature on the left is my own. This document was signed in the Central Police Station, in the presence of several other officers, namely, Murphy, Hasemeyer and McGuire. The document was written by officer Scarletto, the stenographer, I have seen government exhibit 5 before. I saw it on the first day of April at Central Police Station, city of Toledo. The signature is that of Harry Porter. I saw him sign it. Officers Hasemeyer, Murphy, McGuire and Scarletto were present at the time. I had some conversation with young Porter in the drug store. It was in the rear of the store by the sink. He was back there with some bottles. Nobody was there when I started to talk at the time. I asked him how long he had been working. He told me he guessed it was three or four weeks, not more; but it might have been six weeks. He said he was acting under the orders of Selzman. I asked him if he ever sold this stuff. He said several times, but not very much of it.

[fol. 90] Objection.

Mr. Evans: We are offering it as against Porter, Your Honor.

The Court: It goes as against Porter, and no other defendant.

(Narrative:) I asked Porter if he remembered how much he sold. He said he did not think he sold over a dozen bottles all of the time he had been there. I asked him if he ever labelled them. He said no; the orders were not to label them unless some well-dressed or business people came in there. He said that he himself had never waited on many well-dressed people because he referred them to Selzman. That is all the conversation I had with Porter.

I do not remember any further conversation with Bracker in Selzman's presence.

I had some conversation with Selzman at the drug store. Bracker and Porter were present; also officers Hasemeyer, Murphy, Gloyd and McGuire. I asked Selzman if he was in the habit of marking these sales of denatured alcohol down in the books. He said he had been in the habit of doing so. I asked them if he would tell me the last sale he marked down. He said he did not remember just then. Then Hasemeyer questioned him some in my presence. He asked him if he would have an undertaker friend. He said, I should worry what they do when they go out of here. If they want to drink it, it is their hard luck. Selzman said this to Hasemeyer. Hasemeyer asked him if he had an undertaker friend. He said, I should worry; I do not care what they do with it after they go out of here. I do not care whether they drink it or what they do with it.

I have seen government exhibit 6 before. I saw it on the first day of April, 1924, at Selzman's drug store. And I had some conversation with Selzman relative to the book. I asked him when he marked down his last sale. He said he did not just remember. He said not very long ago. We looked the books over, and we could not even find a sale where he had marked down for denatured alchol.

[fol. 91] Cross-examination.

By Mr. Breitenstein:

I could not say if I have related the conversation with Mr. Carter in full. I merely mentioned the questions I asked him. I do not remember anything further that he said in the presence of Selzman. We had a further conversation at the police station in the presence of five or six officers. Selzman was not there. I did not reduce the conversation to writing. I did not take the conversation about the undertaker down in shorthand, or anything like that. It happened on April 1st, six months ago. It is not a fact that this Carter said, in front of Selzman, that he was a janitor and that he wanted this alcohol for cleaning purposes.

Q. He did not say that he did not do that, did he?

Mr. Evans: Objection.

Q. He did not say that he did not say at the time that he bought this he was a janitor and bought it for cleaning purposes, did he?

The Court: Was there any talk you heard on that subject at all?

A. No, sir, never heard anything like that.

Q. This man Carter was a janitor, was he not?

A. No, sir, he told me he was a bum and lived all over.

Mr. Breitenstein: A bum may be a janitor sometimes.

The Court: Is Carter a witness in this case?

Witness: Carter is dead.

Redirect examination.

By Mr. Evans:

I have no written statement from Carter of the conversation that occurred in Selzman's presence.

Q. What is the fact as to whether you did have a written statement from Carter?

Mr. Breitenstein: Objection. It can have no bearing and is immaterial.

[fol. 92] The Court: I agree with you. I do not see that that is material. What he would say would not come into this case. There is no particular reason for his testimony here whatsoever about any statement later on. It could not be material and could not bind or defend. The court is ruling that this statement, whatever it was, should not be produced in evidence.

Mr. Evans: We will withdraw the question.

Thereupon, the government, to maintain the issues on its part, called as a witness in its behalf C. GLOYD, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is C. Gloyd. I am a police officer of the city of Toledo. I have been a police officer for two and one-half years. I do know a man by the name of James Ryan. I did see him about the first day of April of this year. I saw him first on Superior Street. He was not alone. I was following another man and this man went and talked to Ryan. I first met the man I was following on the corner of Superior Street, and I said, did you know that Hunky Johnnie died last week. He said, yes. I said did you know where this fellow was buying this——

Objection.

The Court: That is withdrawn and stricken from the record.

(Narrative:) I know this fellow only as Dope the Bum. I saw him in Central Police Station that day. Officers McGuire, Murphy and Howard were present. Dope the Bum was given a one dollar bill and a half pint bottle. Next he went out. He was going to get another man to purchase this stuff.

Objection: Immateriality; sustained.

(Narrative:) The next thing I saw him do, he went into a pool room at 44 Superior Street. He remained there only about a minute and then he came out and told me that——

[fol. 93] Objection; Sustained.

(Narrative:) I followed him across the street down to near Washington Street. This man Ryan met him there and then they went over to Superior and Monroe, over to Huron, across Huron to Adams, and across to Erie. I followed Dope the Bum and Ryan through the court house yard to Canton and Jackson where they went. In the meantime I told him just beyond there to walk up Woodruff. The next thing I saw as we neared Woodruff Street—I was close behind—Dope the Bum handed Ryan a dollar and this half pint bottle, and he went on across to the drug store. The drug store right at the corner of Woodruff and Canton. Selzman is the owner. When he came out they met right at the corner, he and Dope the Bum, and went up Woodruff Street. As they neared the machine, Officer Howard came across the street, and I motioned to him like that (indicating) to tell him they had it.

Mr. Breitenstein: I object to that motion.
The Court: That goes out.

(Narrative:) Then they stopped there. I said to Ryan, what have you there. He said, I have a bottle of gin.
The Court: What did you take away from him?
A. The bottle. Officer McGuire took that.
The Court: What kind of a bottle was it?
A. A half pint.

(Narrative:) Government Exhibit 1 looks like the same bottle McGuire gave Dope the Bum in Central Police Station. After we took the bottle away from Ryan, the next thing was officers McGuire, Murphy and Howard went into the drug store. I sat there with Ryan. They motioned me down. I walked down with him into the drug store. When I got to the drug store, the officers were there, Selzman was there, Bracker was there, and Porter was there. I don't remember that Selzman was there when I first went into the drug store. It was a very few minutes before I noticed him. About fifteen or twenty minutes after I was there, Hasemeyer came in. I [fol. 94] don't believe that I heard any conversation with Bracker. I overheard conversation between Hasemeyer and Selzman. First they were standing near the front door. Hasemeyer said to Selzman, did he have a friend an undertaker. He said, no, what the Hell do I care. I did not tell them to drink it, did I. Officer McGuire asked Selzman also if he labeled the bottles. He said yes, he labeled every one. McGuire said, here is one you did not label, and showed him the bottle.

I could not say whether or not I saw Government Exhibit 6 before.

Mr. Breitentsein: There is a statement that McGuire said, here is one you did not label. That refers to a sale not from Selzman.
The Court: It is part of the res gestæ, part of the conversation with Selzman himself.
Mr. Breitenstein: It could not bind Selzman as it was not made by him, or while he was there.
The Court: It is a question whether it has any effect on Selzman or not. It resolves itself into whether——

Mr. Breitenstein: It is unnecessary. He would not be called upon to say anything.

The Court: It may stand. Go on.

Exception.

Mr. Evans: Take the witness.

Cross-examination.

By Mr. Breitenstein:

I made no written record of this conversation between Hasemeyer and Selzman.

Q. And you are certain that the language you just gave, which you say Selzman used, is exactly, quoting him exactly?

A. I might not have quoted all he said right there.

Q. Everything he did say is everything you did say?

A. What I used he used in the store, yes, sir.

Q. Every word of it?

A. What I said is what he said in the store.

[fol. 95] Q. And that is the exact language?

A. I said just what he said in the store.

Q. That is the exact language he used?

A. I may not have given it just as straight as he gave it in the store, but he used that language.

(Narrative:) He used every word of it. I was on the outside when Ryan went into the store. I do not know what conversation took place there. I was less than five minutes with Ryan outside the store. Hasemeyer was not in there when I went inside. He came about fifteen or twenty minutes later, I should judge. Selzman was not in the store when I went in. He came in with another man after I was there. It was a short time after; I could not say exactly how long. It was about fifteen minutes—something like that. Hasemeyer was there first, I believe, before Selzman arrived. I said it was fifteen or twenty minutes after Hasemeyer came before Selzman arrived. Before Hasemeyer came it was only about fifteen minutes. To make my story straight now, I can say that Selzman came in the store first, for I remember them having some dispute and talk between them. I went to straighten my — by saying that Selzman arrived before Hasemeyer. There was five minutes difference in the time, I believe. I may have been in the drug store, something like that; I did not take notice. I don't believe I was there any longer than that, that morning. We were in there quite a bit, I cannot remember if it was longer than a half hour. I could not say whether it was longer than a half hour or not. The other officers left when I left. I could not say for sure if Hasemeyer left also. I went into the wagon and took the defendants away. The defendants went with me, Selzman and Porter. There were others in there too: Bracker was in the wagon also. I would not say for sure, at this time, if any one else besides the defendants was in the wagon. Some of the officers went with me. I could not state the names of the officers

[fol. 96] working on the wagon that day. I cannot say about these other officers. Ryan went with us. Dope the Bum did not go along. We stayed in the store a very short time after Hasemeyer arrived. As soon as they got the books and things together we left. Hasemeyer, McGuire, Howard, Murphy and Selzman got the books together. I was in the store standing there,—in the drug store. From my observation it was the same as any other drug store. After they got the books and everything together, we left. Some alcohol they took out of the place. There was some conversation after he came. I did not hear what was said. I heard what was said between Hasemeyer and Selzman. I did not get into everything that went on. What I stated was spoken so loud, I could hear it. Outside of that, Howard, Murphy and McGuire were working on the Prohibition Squad at that time; I merely went along to give them the information. I let them tend to things when they got over there. I heard Selzman say to McGuire, that he labeled all the bottles. McGuire handed him this bottle here; and there is no label on it. That is the bottle that was taken from Ryan and Dope the Bum. I could not say if Selzman was there when Ryan came in. I said he came before I went down there. I saw Ryan go into the drug store and come out. I stayed on the corner near the drug store. First the officers went in; then I went in; and then I saw Mr. Selzman come in.

Mr. Breitenstein: That is all.

Thereupon, the government, to maintain the issues on its part, called as a witness in its behalf WILLIAM HICKEY, who, being first duly sworn, testified as follows:

[fol. 97] Direct examination.

By Mr. Sears:

My name is William Hickey. I live at 316 Mulberry Street, Toledo, Ohio, Lucas County. I cannot see the man you are pointing out. Now I can; he is Mr. Selzman. I saw him before at his drug store at Woodruff and Canton streets. I couldn't just say exactly when. It was when I went to get some denatured alcohol. I couldn't say just exactly what month. I think it was last Spring—last Fall, I think it was, if I'm not mistaken. It was a year ago, I think. I do not know exactly; I was crazy with it.

Q. Go ahead and tell the jury what you did?

Mr. Breitenstein: I object to the testimony; a year ago is not the time covered by the indictment.

Overruled; exception.

(Narrative:) I was over to Mr. Miller's house and I got two from him—from Mr. Selzman—two half pints of denatured alcohol *half pints of denatured alcohol*—one at a time.

Q. Tell about the first time?

Mr. Breitenstein: I ask that he be required to give the time and the date sufficiently so that the defendants may have an opportunity to meet it.

The Court: The time ought to be connected reasonably to the time of the indictment; but do not ask the Court to rule independent incidents of this character cannot be testified to, because they can be.

Mr. Breitenstein: I am not asking the Court to rule upon that particular question. I am asking the Court to rule, at this time, that there must be some degree of certainty about this, so that a defendant may have an opportunity to meet the issue; because they might run in here many persons who might say that, during some time, within a year, or something, they might have done something, and it would be impossible for a defendant to meet the proposition, and he would not be given a proper opportunity to defend himself as contemplated by the Constitution.

[fol. 98] The Court: Do you remember about the talk, last Spring, about the sale of denatured alcohol at this store?

A. I went there——

The Court: Do you remember a lot of talk about it aroun*g* here?

Mr. Breitenstein: I ask that this testimony about a year ago be stricken out.

Overruled; exception.

Q. I will ask you whether or not it was not it was not along last April when you went to the hospital.

A. Yes sir.

Mr. Breitenstein: The period of the conspiracy is between March 1 and April 1.

The Court: There is a question of interpretation in this case. I mean this: a question of the determination of the guilty knowledge, if any, convicting knowledge, if any, on the part of the defendant; and if the government can show a consistent course of practice there to cater to this class of trade in that sort of way, the government may show it on that kind of a case.

Mr. Breitenstein: It must cover some period of time. It cannot be unreasonably long beyond the time.

The Court: Six months prior to April would not be unreasonably long.

Mr. Breitenstein: I think so. There is a locus penitentia always.

The Court: I think so. I am assuming that the government will carry it down.

Mr. Breitenstein: Unless it is connected up, we ask the Court to say to the jury not to pay any attention to it.

Overruled; exception.

Q. Was it not the forepart of April or late in March that the officers got you last Spring?

Mr. Breitenstein: I object to the leading form of the question.
[fol. 99] The Court: In view of what the Court sees in this man, leading questions will be permitted within reasonable limits.

Exception.

(Narrative:) About that time the officers picked me up from Mr. Miller's house. I bought the liquor from Selzman the day before. I bought two half pints. I went in first and got a half pint from Mr. Selzman; and then I met Stip Miller.

Q. Now, about this half pint——

Mr. Breitenstein: I object. Let him describe it.

(Narrative:) It was in a half pint bottle like that without a label on it. I got the other half pint the same day about an hour afterwards, I guess. It was put up the same identical way without any label at all. I paid fifteen cents a half pint for them. We reduced the liquor and drank it.

The Court: You and who else?

A. Stip Miller. He is dead. And Harry Elgus. They are both dead now. They are dead from the effects of it.

Mr. Breitenstein: I object to it. It does not make any difference here so far as this testimony is concerned.

Overruled; exception.

Q. What, if any, effect did it have on you?

Mr. Breitenstein: I object to that.

Sustained.

Cross-examination.

By Mr. Breitenstein:

Certainly I was working at that time. I was working for the three men I am working for now. My work is moving and trucking. I was doing that at that time. I went in there with my working clothes on.

The Court: Is this the first day that you bought the stuff in that store?

A. Yes sir.

[fol. 100] (Narrative:) I never bought any denatured alcohol anywhere else. That was the first time I ever drank any of it. I did not say a word to Mr. Selzman about buying it to drink.

The Court: Was the bottle labeled?

A. No sir.

Cross-examination.

By Mr. Binzer:

I work for Mr. William Auth.

Redirect examination.

By Mr. Sears:

Q. How did you happen to go to Meyer Selzman's drug store?

Objection; sustained.

Thereupon, the government, to maintain the issue on its part, called as a witness it its behalf, A. L. HASEMEYER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr Evans:

My name is A. L. Hasemeyer. I am a federal prohibition agent located in Toledo, Ohio. I have been such since April, 1922. I do know a man by the name of James Ryan. I first saw him at 2002 Canton Avenue. I was there in my official capacity at that time. 2002 Canton Avenue is a drug store. Selzman was the proprietor. I arrived at the drug store about 11:00 A. M. It is in Toledo. Police officers Murphy, Howard and Gloyd, and two clerks, Bracker and Porter were there when I arrived. Nobody else was there at that time. I did not see Ryan at that time; not until I was in the store quite a while. I did not have or overhear any conversation with the defendant Bracker at that time. I went to officers Howard and Murphy and asked them what the case was about. I did not have or overhear any conversation with the defendant Porter. I have seen Government Exhibit 5 before, at the police station, that same day, April 1. The signature is Harry Porter's. I saw him [fol. 101] sign it, in the presence of Howard, Murphy and McGuire. My name appears on the paper as a witness to this document. I have seen Government Exhibit 4 before, at police station, on April 1. I do know the signature; it is Bracker's. I witnessed his signature. The document was executed in the presence of officers Howard, Murphy, McGuire and Scarletto.

Mr. Evans: If Your Honor please, I desire to offer these two exhibits in evidence.

The Court: You may have them with the understanding that they are accepted only in the cases of the men who signed them; but not against any one else.

(Narrative:) I have seen Government Exhibit 1 before. I first saw it at 2002 Canton Avenue, at Selzman's drug store on April 1. Officer Murphy had that bottle at that time. I labeled the bottle and

took it, with the rest of the alcohol seized, with the books, and put them in the Property Room of the Police Station. I next saw it on May 7 when I went to the office of the City Chemist, Kirschmaier, in the Commerce Guardian Building and got it from him personally. I then transmitted it myself personally to Columbus, and delivered it personally to the Government Chemist at Columbus whose name is Kneeland. I next saw it here in the court room.

Mr. Evans: We desire to offer Government Exhibit 1 in evidence at this time.

The Court: You may have it.

Mr. Breitenstein: I desire to object on behalf of the defendant whom I represent on the ground that no evidence has been adduced that the contents of Government Exhibit 1 are fit for beverage purposes.

Overruled; exception.

Mr. Binzer: I make a similar motion.

Overruled; exception.

The Court: Every defendant may have this.

[fol. 102] At this time, if Your Honor please, I also desire to offer in evidence Government Exhibit 2.

Mr. Breitenstein: At this time, Your Honor, I also desire to object on the ground that there is no testimony here that it contains alcohol. There is a statement in the indictment. There is no testimony here that it does contain alcohol.

The Court: You may enter that objection. I understand that the government is——

Mr. Evans: I will withdraw my offer of Exhibit 1; but I renew the offer as to Government Exhibits 2 and 3.

The Court: They are in.

Mr. Evans: It was taken out of the Selzman drug store.

The Court: Whether they are in as to Selzman or any other defendant we will pass upon later.

(Narrative:) I have seen Government Exhibit 6 before. I saw it at Selzman's drug store, 2002 Canton Avenue. I asked Selzman at the time if his books and permits were there. He showed them all to me. I asked him for a record of his poison sales. This is the book he showed me.

Mr. Evans: We offer Government Exhibit 6 in evidence, Your Honor.

Mr. Breitenstein: I do not see the materiality of that. They claim this is fit for beverage purposes and they show that it is poison. I may be mistaken. I do not know of any ordinance or rule which requires any one to keep a record. Does the government claim there is some law which requires a druggist to keep a record?

Mr. Evans: The government claims that Selzman said he kept a record of such things; the books show that he did not.

The Court: Is there a regulation concerning this?

Mr. Breitenstein: That would be in the nature of rebuttal testimony.

[fol. 103] The Court: They can put in any statement Selzman made with reference to the way he transacted this business. If he made a statement that he kept records, and it turned out that he did not, it will be competent. I think the government may have this——

Mr. Breitenstein: Exception, on the ground that there is no requirement to keep a record of that kind, any city ordinance, state or federal law or regulation; and that if it is introduced for the purposes for which the government claims, it is in the nature of rebuttal testimony and not admissible at this time. I desire to note my exception.

Mr. Evans: The government further offers this as evidence as to how he did transact his business.

The Court: Go on.

(Narrative:) I talked with the defendant Selzman on the first day of April. I asked him what he was selling that stuff for without putting labels on it. He seemed to be reluctant to answer me.

Mr. Breitenstein: That is a conclusion. We ask that——

The Court: That goes out.

(Narrative:) Then I talked with him a little bit further. He did not answer me. Then I said jokingly that he must have an undertaker friend somewhere to be selling this stuff] He said he did not need any one. It was up to the man who was buying the liquor. I did not have any further talk with him at that time. I examined the drug store for the presence of other denatured alcohol on the premises. I think I found in all twelve gallons of denatured alcohol that had labels on it, poison labels. It was in the workshop, I would call it—the prescription counter,—back of the partition. Selzman told me the source of his supply, W. & C. Mayer. I questioned him as to the records of his purchases. He showed me all those. He gave me the books at that time.

Mr. Evans: Take the witness.

[fol. 104] Cross-examination.

By Mr. Breitenstein:

Canton Avenue is one block west of the County Jail off Jackson Avenue, in the city of Toledo. There are a good many colored people in the neighborhood. I would say the community is composed of a very poor class of people, still there are some very good people on Canton Avenue.

Q. They might be there because of getting a street car or something of that kind?

Objection.

(Narrative:) This was a regular drug store, and to all appearances, like any other drug store. There is no regulation that I know of as to how many gallons of denatured alcohol a druggist may have on hand. The fact that he had twelve gallons has no significance other than to state the amount I found there. I do not know about any regulation that says a druggist shall keep account of the denatured alcohol he gets and sells. I have been in the Prohibition department of the federal service for some time. I arrived at the drug store, I should judge, about 11.00 A. M. I think I was there an hour all told. I have told about the conversation I had with Selzman. I have told what he said here.

Mr. Breitenstein: That is all.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf JACK DAVIS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sears:

My name is Jack Davis and I live at the Buffalo Hotel, Toledo. On March 31, I was out to Ferguson's Camp. I was in the Buffalo Hotel on the morning of the 30th of March. I visited Meyer Selz-[fol. 105] man's drug store on the 30th of March. It fell on a Sunday. I visited Selzman's drug store on that day between 9.00 and 10.00 in the morning, I should judge. I asked William Cronan to take a walk up with me. I told him I had fifty cents and we would go and get a pint. So I got an empty pint bottle, and he had an empty half pint bottle, and we walked up there together. He told me how to go up and get it so I walks in. Some gentleman with specs cames from behind the cash register. I walked right up and had the bottle in my hand. He took the bottle and I said, a pint. When he comes out with it, I gave him fifty cents. I paid fifty cents for the pint. I don't know who the man was who sold me the pint. He had specs, a short, stout, dark-complexioned man. That fellow there looks like him; he had specs on. (Witness points to defendant Selzman.)

The Court: Let the record show that the identification is of the defendant Selzman.

(Narrative:) The container I bought the pint in was a pint bottle. I brought the bottle with me. The bottle had nothing on at all—had no label on it. That is all that took place, and I walked out after I gave him the fifty cents. The bottle wasn't wrapped up. I put it in my overcoat pocket and walked out. That is the first time I was ever in the place. I walked over across the street to where a fellow was waiting for me and we walked up to the Union Depot

where we mixed the half pint with water. We drank that half pint before we went down to the Buffalo Hotel. We had more than a half pint left. We drank a half pint of the mixture.

Mr. Pilliod: I move that this testimony be stricken out of the record; it is immaterial, what these men did.

The Court: I think it is immaterial what became of it.

Mr. Sears: Our indictment charges that this was sold for beverage purposes, and we think that proof that it was used for that purpose is competent.

[fol. 106] The Court: What was done with it afterwards does not indicate the intent with which it was sold so as to charge knowledge of the purpose for which it was bought.

Mr. Breitenstein: They might have bought it for cleaning purposes and drank it afterwards.

The Court: That does not charge Selzman with knowledge of what it was to be used for.

The Court: Did you ever go to this place again?

A. No, sir, that was the first time I was in the place.

Cross-examination.

By Mr. Pilliod:

I was not employed at all at that time. I generally work all Summer. I generally worked down to Hinz's in Bowling Green about the first part of December, from the middle of October. I generally clear about one hundred and fifty dollars working in Hinz's at Bowling Green in the catsup business; and nearly every year I go up on the ice; and I work at railroad work and depots. I am not positive that this man at the table sold me the pint. I was only in the store about two minutes. What I have said of the conversation is all that was said. I did not tell this man I wanted to drink what I purchased. I did not speak to any one about this case before I came on the witness stand. I have not, to my knowledge, talked to any of the police officers about it before I came on the stand. I was in the prosecuting attorney's office, but I told him the same story as I did the day they took me from the hospital. They did not describe the man to me.

Redirect examination.

By Mr. Sears:

Q. What, if anything , did you ask for when you went into the drug store?

Mr. Pilliod: I object. It has been testified to.

Overruled: Exception.

[fol. 107] The Court: He may answer. What did you ask for?

A. I asked for nothing. I handed him the bottle and asked him for a pint.

The Court: You did not tell him what you wanted?
A. No sir.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf WILLIAM CRONAN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is William Cronan. I am 43 years old. I have been in Toledo about twelve or thirteen years. My home is in Boston.
Q. Were you in Toledo on or about the first of April of this year?

The Court: Last Spring?

A. Sure, yes sir.

(Narrative:) I do know a man by the name of Jack Davis. I don't know exactly how long I have known him. About eight years; maybe seven years. We went around together. We went around together in March of this year. I was catching on jobs. I had been working at railroad work and I got laid off in the middle of January. Then the r. r. work opens up the first of April; and I was just catching on jobs here and there. I worked for McCutcheon and Pearson. He does contract work for the Pennsylvania Railroad. Davis and I did considerable drinking together during February and March. We were drinking denatured alcohol. I bought it up to that drug store at Selzman's, Woodruff and Canton Avenue. I don't know the exact date when I first started buying it, but it is around the fifth of February. I would not say that is the exact date; it was around the fifth. At that time I paid fifteen cents for a half pint. I did not always pay that price—about a little over two [fol. 108] weeks—somewhere around there—it was raised to twenty-five cents a half pint. From the fifth of February up until April first I had been to Selzman's drug store thirty-five or forty times is the nearest I can get to it—about thirty-five or forty times. I mostly always would buy a half pint. I can only remember about twice I bought a pint. It was always half a pint. I always had a bottle myself. For the first couple of weeks they wrapped it up in a kind of bluish paper, light bluish paper, the kind of paper they use in a drug store. I can positively swear there never was a label on it. I bought the alcohol from the proprietor, supposed to be Selzman, the name; and then there was a dark-complexioned fellow; and then there was a young fellow. That is one of the clerks right there: the second one from the end; and there.

Mr. Evans: He indicates Bracker and Selzman.

Q. Any one else?
A. I would not positively swear to him (indicating defendant Porter); it looks like him.

(Narrative:) I know that Jack Davis bought denatured alcohol from Selzman's drug store. I was with him the last Sunday in March. He bought it himself. I did not go into the store with him. I stood across the street. I saw him come out. When he came out, we went away together. He showed me a pint bottle. I know there was no label on it. It was not wrapped up.

Cross-examination.

By Mr. Pilliod:

At the time I was just catching on jobs, waiting for the first of April when the railroad work opens up. Just after we got laid off the Michigan Central, I was working at the wagon works the middle of January. I never do any painting or any cleaning or anything of that kind. McCutcheon and Pierson has got an office in the Nasby Building. They used to do work for the Pennsyl- [fol. 109] vania Railroad and I worked two or three days with them; and then when it snowed, I would go out cleaning snow on the sidewalks; and then catch on jobs—just enough to try to keep myself until the first of April when the railroad work started. I never paid much attention to who would wait on me. The last bottle I got there was the Friday afternoon, and I am pretty sure that Mr. Selzman waited on me. I would not swear to it. I never paid any attention to who would wait on me. I would go in and come out quick. I never told Mr. Selzman I was going to drink it.

The Court: What did you ask for, when you would go in?

A. I mostly had a pint bottle when I went in. Outside of seven or eight times when I had a half pint bottle. I would hand it over and say, give me a half pint denatured; and sometimes, give me a half pint.

The Court: Sometimes you would ask for denatured alcohol and sometimes you would not say what you wanted?

(Narrative:) I would never use the word alcohol. I would say, give me a half pint denatured; or, give me a pint. I never used the word alcohol. I never told any one in the store what my work was. I just asked them for what I wanted. I never made the statement that I was a painter. They never asked me, and I never said so.

Cross-examination.

By Mr. Binzer:

Outside of the clerks and Mr. Selzman there, there was a young lady who used to be in there, but she never waited on me. I asked her once, and she pointed to the clerk or somebody. The two men I pointed out back there are the two clerks. They have waited on me. I always brought in a pint bottle, outside of seven or eight times, when I had a half pint bottle. I would get a pint bottle

and get half a pint, mix it up, and make a pint. I would mostly have a pint bottle.

[fol. 110] The Court: You would get a half pint in a pint bottle?

(Narrative:) I would get a half pint and fill it up and make a pint; not always, mostly. The bottle that I usually presented did not have a label on it. It was just a plain, naked bottle, a common pint flask.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf PHILIP THOMAS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sears:

My name is Philip Thomas. I am rooming at 406½ Monroe Street. I have a friend by the name of Tommy Callahan. Tommy and I were together last April second. We walked down to the corner of Canton and Woodruff and got two half pints of what he called denatured alcohol. We got it at the drug store on the corner of Woodruff and Canton. They claim it belongs to Mr. Selzman, There is no sign on the outside that I know of. We got the alcohol in a half pint whiskey bottle. Mr. Callahan furnished the bottle. There was no label on it. It was filled with alcohol. It was not labeled after it had been filled with alcohol.

Q. My question, were they labeled after they had been filled with alcohol?
A. No sir.
Q. They were returned to Mr. Callahan with labels on them.
A. No sir.

(Narrative:) On the Sunday before that, March 30, I got a half pint. I was not alone when I purchased it. Mr. Callahan was with me. This was purchased in the same manner. The bottle did not bear any label. I did not purchase any after April 2. Before April 2, I was taken sick and taken from there down to the Municipal Hospital.

[fol. 111] Cross-examination.

By Mr. Pilliod:

I was never in that drug store in my life. I do not know whom Callahan saw when he went in. I waited outside. I do not know what Callahan said, or with whom he spoke in the store. As to its being Selzman's drug store, I know only just what I heard. Personally, I don't know that it was Selzman's drug store. I drive a truck. I was working for McGettigan's Cartage Company at the time. I used denatured alcohol once or twice before this. I went to another

drug store at those times. Callahan did not go with me; I went by myself. I never bought any at garages or gasoline stations.

Cross-examination.

By Mr. Binzer:

Q. How many times have you been arrested?

Mr. Evans: Objection.

Sustained.

(Narrative:) I am a teamster. I have been all my life, ever since I was fourteen years old, only at one time I worked up to your house.

The Court: Ladies and Gentlemen of the Jury, do not permit yourself to dwell upon this case and reach any conclusion as to the merits of it. Be here tomorrow morning at half past nine o'clock.

(Adjournment to October 10, 1924.)

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf JAMES RYAN, who, being first duly sworn, testified as follows:

[fol. 112] Direct examination.

By Mr. Evans:

My name is James Ryan. I am 47 years old. My people live in Akron. I was in Toledo on the first day of April of this year. Meyer Selzman's drug store is located at the corner of Woodruff and Canton Avenue. I was there on the first of April. I should judge it was about 10:00 o'clock, or a little after. There was some one with me. I started from the corner of Washington and Superior Street. I don't know the gentleman who was with me. I did not call him by any name. I never heard him called by any name. It was the second time I ever saw him; I did not know him personally. This transaction took place between him and me; the morning of the first of April I got up and I was going down past the Buffalo pool room. It was a little late. They had not opened up.

Mr. Breitenstein: We object.

The Court: This is only preliminary.

(Narrative:) I got up the morning of the first of April I guess around nine o'clock. The pool room was late opening up that morning. Just as I was going past it, there was a fellow coming out. He said, Hello, Slim. I said, Hello.

Mr. Breitenstein: We object to the conversation.

(Narrative:) I kept on going down, and was standing on the corner of Washington and Superior. He came down again and he said

there were some fellows in the pool room who gave him a dollar to get a bottle. He gave me a dollar and a half pint empty bottle. I could not swear that government exhibit 1 is the bottle; but it was a bottle *like that. I walked into the drug store and* handed the man the empty half pint bottle. The drug store is at the corner *of* Canton Avenue and Woodruff. I did not at the time know who was the proprietor. The man I gave the bottle to came back with it filled and handed it to me. I gave him the dollar bill, and he gave me the change back from the dollar bill. I saw one of the clerks in the drug [fol. 113] store.

Q. Do you know his name?
A. Not just since he was arrested—it was Bracker or something like that.

(Narrative:) I see him here today. He is the gentleman sitting there, the third man.

Mr. Evans: The record may show that he identifies the defendant Bracker.

(Narrative:) When I went in with the bottle, there wasn't a word spoken between Bracker and me. I handed him the bottle and he went back and filled it up, and he came back and handed it to me, and I paid him the dollar bill, and he gave me three quarters change back from the dollar bill. Then I walked out. I gave the fellow that went up with me the change from the dollar bill, and I thought we was going back——

Mr. Breitenstein: We object.

(Narrative:) We walked up around the corner of Woodruff Avenue and were arrested by three officers. The bottle, which resembles Government Exhibit 1 in appearance, was not wrapped up. It had no label whatsoever on it. After we were arrested, we were taken down to the police station, and we did not go back to the drug store that day. I next saw Bracker at the police station. They took us down together.

Q. I will ask you whether you drank any of this?

Mr. Pilliod: We object.
The Court: He may answer.

Exception.

A. I drank some of it Saturday; I don't know whether it came from his drug store or not.
The Court: You did not drink anything out of this bottle?
A. No sir.

[fol. 114] The Court: Of course, that is incompetent.

(Narrative:) I had never purchased any denatured alcohol at this drug store before. I had been with some one who did. On Saturday morning before this trouble, it was, with a fellow named Hayes.

The Court: Were you and Hayes together in the drug store?
A. No, sir.

Mr. Pilliod: We object.

The Court: Did you see Hayes make the purchase?
A. I did not see him make the purchase. He came in with the bottle empty and came out with it full.
The Court: That is all you know about it?
A. Yes, sir.

Mr. Pilliod: We ask that the jury be instructed to disregard it.

Overruled; exception.

(Narrative:) Hayes had a bottle just like Government Exhibit 1. It was a half pint bottle. He took it in with him when he went in. I saw the bottle when he came out. It was not wrapped up. There was no label on it.
Q. I will ask you whether or not you drank any of the contents that Hayes brought out of this drug store?
Objection; overruled; exception.
A. I drank some.
The Court: Can you tell the jury what it was?
A. Denatured alcohol. That is what they call it.
The Court: It was alcoholic, anyhow?
A. Yes, sir.
The Court: Did you make any preparation of it before you drank it?
A. Yes, sir. We had another half pint bottle and mixed the water and the alcohol together.

(Narrative:) Mixing the water and the alcohol together changed the appearance of the liquid to the color of steam—white.

The Court: It became a light white?
A. A light white, yes, sir.

[fol. 115] Cross-examination.

By Mr. Pilliod:

When purchasing the liquid there was not a word spoken. I have never bought denatured alcohol in any drug store in Toledo at any other time. I drank it before. I bought one bottle in the drug store at the corner of Orange and St. Clair, but they registered it and it had a label on. I drank that.
The Court: You say that had a label on it when you got it?
A. Yes, sir.
The Court: And you registered for it?
A. Yes, sir.

(Narrative:) I have not been with any one who bought denatured alcohol in the city. I was never with any friend when he purchased

denatured alcohol. I was with friends and acquaintances who had purchased it. My business is a switchman. I was not employed as a switchman at that time.

The Court: I may have overlooked this; I will ask you to give to the jury the circumstances when you went in and got this bottle filled. You say nothing was said. What was done?

A. The gentleman walked up and I just handed him the bottle.

The Court: You went in and handed Bracker the bottle?

A. Yes, sir.

The Court: What else did you hand him?

A. After he fetched the bottle back full I handed him the dollar bill and he gave the bottle full. There wasn't a word said.

The Court: You just handed him the flask and he filled it. Then he came back and you handed him the dollar and got the change.

A. Yes, sir.

The Court: That was all?

A. Yes, sir.

[fol. 116] Cross-examination.

By Mr. Binzer:

I did not know the gentleman who gave me the bottle. It had a cork in it. I did not touch the cork or the bottle. The cork was in the bottle. I did not smell the bottle, as the cork was in it. There was no odor of denatured alcohol from the bottle. I did not have it close enough to smell. It was not sealed in any way. The cork was just shoved into it.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf G. A. KIRCHMAIER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is G. A. Kirchmaier. I am a chemist by profession. At the present time, I am City Chemist of the city of Toledo. I have been City Chemist, all told, for about twenty-four years. As City Chemist I have had occasion to analyze various alcoholic liquids and various samples of liquor and alcohol of different kinds. I have made quite a number of such examinations. I make such an examination possibly once a week. Sometimes a week goes by and I don't have any; and the next week I may have two or three or four. I first saw the bottle which is Government Exhibit 1 on April 3 in the City Laboratory. It was delivered to me by Officer Howard of the Toledo Police Force. I analyzed the contents of this bottle and found that it was a mixture of grain alcohol, wood alcohol, crude benzine or pyridine. This mixture is called denatured alcohol.

Q. I will ask you whether or not the contents of that bottle which you analyzed are intoxicating liquors?

Mr. Pilliod: I object.

Overruled; exception.

[fol. 117] A. Yes, sir.

(Narrative:) The bottle was in my possession until I delivered it to Officer Hasemeyer on May 7.

Cross-examination.

By Mr. Pilliod:

The general term completely denatured alcohol is a product that would be made unfit for internal use. Poisonous or non-poisonous products are usually added that will act as a——

The Court: It will affect the palatability?

A. Yes, sir.

(Narrative:) It not only affects the palatability, but, as a rule, makes the product dangerous for internal use. From a legal standpoint, there is a difference between completely denatured alcohol and alcohol which is not completely denatured, but I do not recall such a difference from a chemical standpoint. As I understand it, specially denatured alcohol is an alcohol that has been denatured for some particular use to which it is put by the manufacturer who puts out some particular product. Apparently the purpose for which he intends to use the alcohol industrially or commercially determines the character of the ingredients which he would employ in denaturing it. There are a number of ingredients that might be used to denature alcohol, but I believe what you shall use and what you shall not use is indicated by the government. I believe there must be more than fifty ingredients.

The Court: And in any event, Mr. Kirshmaier, is it not true that the definite and continuing purpose of denaturing it is to render it unfit for beverage use?

A. Yes sir

(Narrative:) I would say then that the alcohol contained in that exhibit is by reason of its denaturization, unfit for beverage use. I do not know where denaturization ordinarily takes place under the regulations. I have been a druggist myself. I could not [fol. 118] tell you positively that the denaturization is usually done by the manufacturer and not by the druggist himself. In the beginning, it was left to the druggist to do, with probably three different ingredients: carbolic acid, formaldehyde and cloride of mercury. That was when the law was first in force. I believe that *the* was the general method of doing it. Afterwards, I think the government or government agents put the denaturing material into the product, or, it was under the supervision of the government.

As far as I know, the government denaturization and supervision were in effect last March and April.

Redirect examination.

By Mr. Evans:

On the whole, I would say that the process of denaturing alcohol does not affect its intoxicating qualities.

Mr. Binzer: May it please Your Honor, Mr. Kirshmaier is one of the character witnessess for Martin Bracker. It may be out of order at this time; but in order to save time, I would like to ask the Court's permission to question Mr. Kirshmaier as a character witness for the defendant, Martin Bracker.

The Court: You may do that.

Direct examination.

By Mr. Binzer:

I have lived in Toledo about fifty years. I have known the defendant, Martin Bracker, possibly eight or ten years — I cannot say positively. I have means of knowing the character and reputation of Martin Bracker during my eight years of acquaintance with him.

Q. Will you answer whether that general reputation and character of Martin Bracker is good or bad?

Mr. Evans: We object until we get this witness qualified.

The Court: This question is improper. He is asking this witness his opinion as to the character of Martin Bracker. Have you the means of knowing the reputation of Martin Bracker in the community in which he lives for character and integrity?

[fol. 119] A. Only in so far as that he was employed in the Kirshmaier Pharmacy for a number of years, and I have known the young man since that time.

The Court: You have observed his movements in and about his environment?

A. Yes, sir.

The Court: What do you say is his reputation among his fellows for integrity and veracity; is it good or bad?

A. As far as I know, it is good.

Thereupon the government to maintain the issues on its part, called as a witness in its behalf D. J. NEALON, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is E. J. Nealon. I am a United States Government Chemist. I have been a government chemist for twelve years. I make examinations of all products that come under the Revenue Regulations, such as, narcotic products, butter, oleomargarine, extracts, miscellaneous alcoholic preparations. I first saw Government Exhibit No. 1 when the bottle was delivered to me on the 8th day of May, 1924, by Agent Hasemeyer. I made an examination and an analysis of the contents of this bottle. At that time it contained more fluid than it does now. It was probably half full. I found this to contain 93.27 per cent of alcohol by volume, and to be a mixture of two parts of wood alcohol, one-quarter part pyridine base, and one-half part kerosene. This is technically called completely denatured alcohol. The contents of the bottle are liquor. It is an intoxicating liquor. It is a poison. The addition of water to this product would cause it to become milky in appearance. The addition of water to pure grain alcohol would not have that effect.

[fol. 120] Cross-examination.

By Mr. Pilliod:

In this particular instance, the milky character of the fluid after it is diluted with water is the direct result of its having been denatured. This result depends upon what denaturant was used. The customary denaturants vary to some extent. This product contains kerosene, and kerosene is insoluble in diluted alcohol; therefore, when you add water to a product of this kind, the kerosene separates. That is what causes the milkiness. I could not hear Mr. Kirshmaier's testimony very well from where I was sitting. I heard some of it.

The Court: I do not suppose there is any dispute about that.

(Narrative:) The substance in that bottle is not fit for use for beverage purposes as a direct result of the denaturization. I don't believe I could say where the process of denaturization took place. I am not familiar with the regulations as they existed in March and April of last year. It is usually denatured at the place where it is made, before it is shipped. This is done under government supervision, I think. I- generally reaches all retail druggists in its denatured condition. I think these facts are true as to March and April of this year.

Mr. Evans: If the Court please, I desire to read into the record Government Exhibits 4 and 5.

Mr. Pilliod: We object.

The Court: They are received into this record only in the cases of the individuals who signed them, that is, the exhibit here respecting the defendant Porter is received in this case only as evidence against Porter. That received in here purporting to have been the statement made by the defendant Bracker is received only in the case of the defendant Bracker.

[fol. 121] Mr. Breitenstein: I would like to have Your Honor tell the jury this: there are some statements here by one of these witnesses, or probably both of them, saying that Mr. Selzman knew of the things which they state. I would like to have Your Honor instruct the jury that that is not any evidence against Mr. Selzman, not as far as proof of conspiracy is concerned, because this happened after the conspiracy had been consummated; and that is not any evidence against Mr. Selzman, because at the time this statement was made out, it does not appear that Mr. Selzman was there, and had any opportunity of explaining or denying the statements made herein. Therefore, not for any purpose whatsoever may any of the statements contained herein regarding Mr. Selzman be considered in connection with the guilt or innocence of Mr. Selzman, or any proof of the allegations, rather, of the indictments in this case.

The Court: Of course that is the effect of the Court's restricted admission of the testimony. When we say that these documents are in this case only in the case of the individuals who made them, respectively, we mean to say to the jury that in no particular are the statements or averments of these documents to be considered as evidence against anyone else, however he may be named in it.

Mr. Breitenstein: I want to note my exception to the introduction of these.

The Court: The court is accepting your theory of their non-application to Selzman's case.

Mr. Breitenstein: We want, upon behalf of the other defendants, to show that there is an objection to the introduction.

The Court: All right; proceed.

Mr. Binzer: That is for all of the defendants.

Mr. Evans: The Government Exhibit 4, "April 1, 1924, 11:30 A. M., statement of Martin Bracker, 24 years, living at 316 Bancroft Street, Toledo, Ohio. In reference to selling denatured or wood [fol. 122] alcohol. I am a clerk employed by Meyer Selzman, 2002 Canton Avenue, Toledo, Ohio. I have been employed by him since June 7, 1923. I am not a registered man for dispensary work. I have been employed by Meyer Selzman at the rate of $32.50 a week. Meyer Selzman also knows that I was not a registered man for dispensary work. I was under orders from Selzman not to place labels on these (showing me a half-pint bottle without a label) half-pint bottles. This has been going on to my knowledge since last September, 1923. If a man or woman was well dressed, I was informed by Selzman to label the bottle, but if a man or woman was not well dressed, I was informed by Selzman not to label the bottle. These half pint bottles (officer exhibiting the bottle to me) was sold for the price of twenty-five cents for a full half pint bottle. This

morning I sold a half pint bottle to a man who police asked me if that was the man that I sold a half pint bottle to this morning (pointing to James Ryan, of Clark's Hotel as the man), and I answered, "I think that is the man." This man who was pointed out to me gave me a one dollar bill. I rung up twenty-five cents on the register, and handed the man back a half a dollar and a quarter, total seventy-five cents. While I was on duty as clerk for Meyer Selzman, I sold to different men and women, mostly colored women, which we averaged a gallon and a half, or about one dozen half pint bottles. The above statement is true to the best of my knowledge, and given to the Toledo police, without any threats, promises or fear. (Signed) Martin Bracker. Statement taken by Louis Scarletto, April 1, 1924. C. J. Howard, Witness. R. D. Murphy, Witness. L. F. Kruse, Witness. W. J. McGuire, Witness, and A. L. Hasemeyer."

Government Exhibit 5: "April 1, 1924, 12:15 P. M. Statement of Harry Porter, age 16, 1208 Monroe Street, Toledo, Ohio. In reference to the case of Meyer Selzman. I am employed by Meyer Selzman at the rate of $13 a week, and have been employed by [fol. 123] Selzman for about seven weeks, as a messenger and some clerical work. While I was employed by Mr. Selzman I sold half pint bottles not to exceed ten bottles. When I first started to sell half pints and pint bottles of wood or denatured alcohol, I put the labels on same. Towards the end, I sold bottles without labels. This was with Mr. Selzman's knowledge. He could not help seeing me fill prescriptions. Mr. Selzman did not specify to put any labels on bottles unless they were well dressed people, but I did not wait on very many well dressed people, as I referred them to Mr. Selzman, or to the other clerk, Martin Bracker. Mr. Selzman never mentioned to me to put any names in the permit book for the sale of wood or denatured alcohol. The above statement is the truth to the best of my knowledge and given to the Toledo police without any threats, fear or promise. (Signed) Harry Porter. Statement taken by Louis Scarletto. C. J. Howard, Witness. R. D. Murphy, Witness. A. L. Hasemeyer, Witness, and W. J. McGuire, Witness."

Now, if Your Honor please, with the exception of possibly one witness, the government is through with its case, and I would like to ask for two or three minutes recess at this time so that we may check up.

The Court: Very well.

Mr. Evans: Before we do that, I want to move formally the introduction into evidence the government exhibits from one to six inclusive.

The Court: I think these exhibits are all in evidence now. If there is any question about it, the matter will be settled. The government is entitled to these various items of exhibit testimony, subject to all of the restrictions which the court heretofore has indicated, that is, the applicability of this testimony to the several cases has been considered already, and the jury has been informed already of the court's limitations.

[fol. 124] Mr. Pilliod We may have an exception as to each one of the exhibits, I suppose?

The Court: Yes, you already have them, I supposed; and if not, you may have them.

Mr. Evans: Do I understand that the dollar bill is now admitted in evidence?

The Court: Certainly.

Mr. Evans: As to all of the defendants?

The Court: As to all of the defendants, the dollar bill is.

Mr. Pilliod: As to all of the defendants?

The Court: The dollar bill is admitted as to all of the defendants.

Mr. Pilliod: We have the same objection and exception.

The Court: Also the record book is in as to all of the defendants.

Recess.

Thereupon the government, to maintain the issues on its part, called as a witness in its behalf HARRY PORTER, who, being first duly sworn, testified as follows:

Mr. Evans: I understood that the defendant Porter desires to change his plea formerly made with respect to Counts 2, 3, 5, and 6, in Case 4206.

The Court: Those are the direct sale counts?

Mr. Evans: Yes, Your Honor.

The Court: He wants to plead guilty to those counts?

Mr. Evans: That is my understanding.

The Court: Is that the fact, Porter?

Mr. Porter: Yes sir.

The Court: How old are you?

Mr. Porter: I am seventeen now, the 5th of September.

The Court: You are just past seventeen.

Mr. Porter: Yes sir.

The Court: These transactions happened last April. How long had you been working for Mr. Selzman?

[fol. 125] Mr. Porter: Six or seven weeks.

The Court: Before that, what had you been doing?

Mr. Porter: I had just come to Toledo.

The Court: Where is you home?

Mr. Porter: Marion, Ohio.

The Court: Have you been a schoolboy down there?

Mr. Porter: Yes sir.

The Court: You have no attorney?

Mr. Porter: No sir.

The Court: I do not believe that a young man like this should be held for as serious count as a conspiracy count, under the circumstance, as I have been informed of the situation from the testimony already in. I think I will accept this plea of guilty to these inferior counts, and receive with some sympathy the government's request, if it does request, that the more serious counts be dismissed against him.

Mr. Evans: We make that motion.

The Court: All right. The conspiracy count is dismissed against this boy.

Mr. Evans: All of the other counts except the three in both indictments.

The Court: Except the three to which he pleads. You may receive his plea of guilty to these three counts. Then I am not satisfied that it is a necessary practice, but it is not an improper practice, and sometimes a very satisfactory practice, for the individual to make a formal request to testify.

Mr. Evans: That has been done.

The Court: A request in writing?

Mr. Evans: Yes, your Honor.

(The request referred to was marked Government Exhibit 7.)

The Court: It is your wish, Porter, to testify to these circumstances, whether they implicate you or not?

Mr. Porter: I am willing to tell the truth.

The Court: You may make this part of the record in the case (referring to Government's Exhibit 7).

[fol. 126] Mr. Breitenstein: For the record, I desire to save a formal exception.

The Court: You want to save the record so that all of the record we have made heretofore shall be applicable to this situation?

Mr. Breitenstein: And particularly because this procedure took place in the presence of the jury.

The Court: There has been no objection to its taking place in the presence of the jury. The court has not had its attention called to any necessity of any such situation, and what might have been the court's action, had the request been timely made, is unnecessary to consider now. I see nothing in this situation which should in any way tend to prejudice any defendant remaining on trial by this action. It is competent for a defendant on trial to plead guilty in open court at any time he pleases. He does not need to ask the permission of anybody else. It has been the court's practice, when requested to do so, to receive pleas of this kind at other times; but that has not been done here. You may take the stand, Porter. Has the oath been administered to him?

Mr. Evans: Yes, I understand that this (referring to Government Exhibit 7) may become a part of the record?

The Court: It becomes part of the record.

Mr. Breitenstein: Note an exception.

Direct examination.

By Mr. Sears:

My name is Harry Porter. I am seventeen years old. I now live at Chicago, Illinois. On the first day of April, 1924, of last Spring, I was living at 1208 Monroe Street, Toledo. I was a clerk and messenger boy at Selzman's drug store, at 2002 Canton Street.

I started to work at Selzman's drug store about the last of February, somewhere in there. When I first started I came on at noon and worked until 11:00 in the evening, and the next day all day from 7.30 [fol. 127] until 6:00. People came in and asked for denatured alcohol and Mr. Selzman told me to sell it.

The Court: You did have occasion to sell it?

A. Yes sir.

Q. Tell about some of the occasions on which you sold denatured alcohol?

Mr. Breitenstein: What was done and said.

The Court: That is what he is asked. Go on.

(Narrative:) A man came in to the desk and asked for denatured alcohol, and handed over the bottle, and at first, like I always—I took it back and filled it, and like I did everything else, I put labels on it, and Mr. Selzman said it was not necessary to put labels on it. I can't just exactly give the dates on which I made these sales. The last part of the time—I sold some Sunday, March 30,—I think it was Sunday. I did not sell any the previous day. I sold it on March 30. I did not sell any the next day, Monday. I sold some on Saturday, the day before. I did not sell over four or five bottles on these two days. None of these bottles were labeled.

Q. I wish you would tell the jury just exactly what instructions, if any, you received from Mr. Selzman with respect to labeling bottles?

Mr. Breitenstein: I object to that at this particular time unless he states the dates and the times when these instructions were given.

The Court: You say you worked for Selzman about six weeks?

A. Yes sir.

The Court: If he had any instructions during any of that time, it is competent.

Mr. Breitenstein: The date when they were given.

The Court: That can be gone into afterwards.

Mr. Breitenstein: I want to object to the word instructions. I think he should be asked what was said to him instead of using the word instructions, because that is a conclusion.

[fol. 128] The Court: That is a comprehensive word. What, if anything, did Mr. Selzman say to you by way of instruction as to labeling these bottles?

A. He told me not to put labels on them unless to well dressed people.

(Narrative:) He told me this during March. I did not sell over a dozen bottles of denatured alcohol during the six weeks that I was there. I witnessed other sales besides the ones I made. The bottles in those instances were not labeled.

Mr. Breitenstein: There is another ground that I have in mind. I think, in order to preserve the record, and to protect the interests

of my clients, I should except also to any testimony concerning any sale which is not to the persons named in the indictment.

The Court: You may make that objection, but the court does not sympathize with you. This statute is rather a peculiar one. The statute calls in question the good faith of the sale.

Mr. Breitenstein: I mention that for the record merely; and I want to note my exceptions.

The Court: The court wants to explain his position. The statute calls in question the good faith of the sale, and, consequently, collateral instances are always receivable, if they tend to reflect the character of the sale, as to whether or not it was in good faith.

Mr. Breitenstein: But the defense has no opportunity of cross-examining the people to whom he says he sold it, to ascertain the truth of what the witness states on this question.

The Court: If you were defending a case for violation of Section 215 of the Postal Laws, for instance, you would be bereft of the same opportunity, very often.

Mr. Breitenstein: We would know the names of every person who received something through the mail, and we could call them if we were so disposed.

[fol. 129] The Court: But the government is not obliged to tell you beforehand. You have to take your chance as it developes in the trial. We have had this question a great many times. This is competent.

Mr. Breitenstein: I want to note an exception for the record.

Q. At the time Mr. Selzman issued instructions by telling you that you should not label bottles except when they were sold to well dressed persons, were any of the other employees of the store present, if you know?

A. I do not remember.

Mr. Breitenstein: I object to that, because there ought to be a time and place fixed.

The Court: He said he doesn't remember.

(Narrative:) When I first started to work for Mr. Selzman, the price per half pint of denatured alcohol was fifteen cents. About the 30th of March, it was twenty-five cents. I don't just remember the date when the price was increased. It was during the month of March.

The Court: How did you happen to increase the price?

A. I don't know.

The Court: Did you get any order as to what the price should be?

A. He told me what the price was.

The Court: Who did?

A. Mr. Selzman.

The Court: Told you to sell it for twenty-five cents rather than fifteen?

A. He did.

The Court: Let me have the counts of the indictments to which he pleads guilty.

Mr. Sears: 2, 3, 5 and 6.

The Court: Do you remember the name of the man to whom you sold alcohol on the 30th of March?

A. I don't remember any names.

[fol. 130] The Court: How many times did you sell on the 30th of March?

A. About two times.

The Court: These men never gave you any names when they came in?

A. No sir.

The Court: On either of these occasions were the men well dressed or otherwise?

A. They were not well dressed.

Cross-examination.

By Mr. Breitenstein:

Q. I want to show you, Harry, Government Exhibit 5, and call your attention to this line: "Mr. Selzman did not specify to put any labels on bottles unless they were well dressed people." Read that line, will you? That is your signature, is it?

A. On this line here (indicating?)

Q. Yes.

A. He didn't tell—He told me to leave labels off.

(Narrative:) That was my statement taken before these officers. I made the statement at Central Police Station. There were a number of officers around. I had been taken down there by the officers. I was there from 11:00 until about 2:00, I think; I don't remember how many hours, but it was through noon. Then I was taken to the County Jail. I was kept there until Thursday afternoon. I made this statement between 11:00 and 2:00 o'clock The officers told me to tell what I knew. They did not say anything else. They just wanted me to tell the truth. Nothing else material except these words was said to me during the time. That is all that was said to me. I don't know officer McGuire. Now I remember officer McGuire, who testified yesterday. I don't remember that Mr. Hasemeyer said anything to me. They asked me questions; I answered them. These were all the questions that were asked, and there was nothing else said.

[fol. 131] Q. Do you remember a statement that you made at a later time where you said that these men came and got this alcohol for cleaning purposes?

Mr. Evans: I object, unless he fixes the time.

Mr. Breitenstein: They did not fix the time for us.

The Court: If you are going to impeach this witness, you will have to fix the time.

Q. Do you remember making a statement on April 3, 1924?
A. Here at the Federal Building?
Q. In the city of Toledo?
A. I don't understand what you mean.

(Narrative:) I don't remember of making any statement under oath in addition to the statement which I made at the police station on April 1. On April 3 I was taken in front of Mr. —, I don't know what his name is—and I was released that day; but I was asked no questions.

The Court: Taken before a commissioner?
A. I was.
The Court: A commissioner of this court, Mr. Gaines?
A. Yes, sir.
The Court: And you were released that day?
A. Yes sir.
Q. Did you ever make a statement to any one that these people, when they came in and asked for denatured alcohol, that they said that they bought it for cleaning purposes?
A. A few did.

The Court: That does not answer this question? He was asked whether he ever made the statement to any one whether these people who bought this alcohol stated that they wanted it for cleaning purposes.

A. I don't think to any of the officers——
The Court: As a matter of fact, some of these men who bought this denatured alcohol did say to you that they were buying it for cleaning purposes?
A. Yes sir.

[fol. 132] (Narrative:) I don't know the names of any of the men to whom I sold denatured alcohol.

The Court: You saw yesterday a man by the name of Cronan on the witness stand?
A. I saw a big man; I don't know what his name was; and I remember I sold a bottle to him.
The Court: Did you see this man this morning, Ryan; on the stand?
A. Yes sir.
The Court: Did you ever sell any to him?
A. Yes sir.

(Narrative:) When they came in they asked for denatured alcohol. I don't remember William Hickey or James Carter. I don't know any of those names. I had a conversation with the District Attorney to-day before I went on the witness stand. It was just a few words back of this court room. He asked me a few questions. He had written that paper down in his office and I had signed it. He prepared the paper for me. I read it and I understand it. He had me read it over and I signed it. The first time I saw it was when he

brought it over and read it to me and asked me to sign it. My father was there. One of my friends was there too. Nothing was promised me by the government if I pled guilty and testified for the government. They did not say they would help me. They did not say they would do what they could for me. They said I would have to take the consequences. But they said they would make a recommendation to dismiss the conspiracy count.

Q. And that you would only have to plead guilty to the counts charging an offense against the National Prohibition Act?

Mr. Evans: He has answered that question once.

The Court: He may answer that.

Mr. Breitenstein: This is a very important proposition, and I don't think you ought to be touchy about it. If there was *was* nothing wrong said, you ought not to except.

[fol. 133] Mr. Evans: There was nothing that I said wrong yet.

Mr. Breitenstein: I am trying to find that out.

The Court: Of course, we all understand what the tendency of this evidence is, so far as the conspiracy charge against this boy is concerned. The court granted the request of the government to dismiss it only on account of this boy's inexperience and youth and evidence of subordination.

Mr. Breitenstein: On the other hand, the court did not do this of its own violation. It was brought to the attention of the court by the District Attorney.

The Court: It would have been done by the court's own violation if it had not been by the District Attorney.

Mr. Breitenstein: What I am trying to get at is, it was brought to your attention at this time before the boy went on the witness stand.

The Court: Yes.

Mr. Breitenstein: And he was told that they would recommend the dismissal before it was brought to the attention of the court.

The Court: You have that.

(Narrative:) Mr. Selzman did not tell me that this denatured alcohol was being sold for cleaning purposes. I did not say so, on April 3rd. I do remember now I did testify at a hearng before the coroner on the 3rd of April, 1924.

The Court: Before the coroner of Lucas County?

A. Yes sir.

The Court: Let us find out whose inquest that was?

Mr. Breitenstein: Philip Miller.

Q. Was not this question put to you at the time, and did you not say: "The boss let me think it was sold for cleaning purposes," at that hearing?

A. He did not state it in just so many words.

(Narrative:) He let me understand that it was being sold for cleaning purposes, and I understood that all of the denatured alcohol was sold for that purpose.

[fol. 134] Cross-examination.

By Mr. Binzer:

I never worked in a drug store before I went to work for Meyer Selzman. I never sold denatured alcohol before I worked for Meyer Selzman.

Re-direct examination.

By Mr. Binzer:

Q. Mr. Breitenstein asked you how you happened to be testifying on behalf of the government. I wish you would tell the jury whether any suggestion was made to you that you should not testify at all in this case?

A. You mean by the District Attorney?

Q. I don't care whom by? Was any such suggestion made?

A. That I should not testify?

The Court: Did anybody advise you not to testify at all?

A. They said it would be better not to.

The Court: Who did?

A. The lawyer; Selzman's lawyer.

Mr. Evans: At this time, the government desires to make a motion that the indictments against the defendant Aaron Liebenthal be nollied, all of them, for the reason that I believe the government has failed to produce any evidence against Aaron Liebenthal.

The Court: Is Liebenthal here?

Mr. Breitenstein: Yes, Your Honor.

The Court: How old are you, Liebenthal?

A. Fifteen.

The Court: How long have you worked for Selzman?

A. About five days.

The Court: I am very glad to dismiss this case against you. You are out of the case.

Mr. Evans: The government rests.

The Court: Proceed with the defense.

[fol. 135] Mr. Breitenstein: I desire to ask at this time that we have at least fifteen minutes to consult.

The Court: I will give you your fifteen minutes now.

Recess.

Mr. Pilliod: The defendant, Meyer Selzman, moves the court to direct the jury to find a verdict of not guilty on behalf of the defendant Meyer Selzman upon the ground that the evidence brought forward by the government is not sufficient to sustain the verdict of guilty upon both indictments and upon each count of the indictments.

The Court: The motion is overruled, with exceptions.

Mr. Binzer: Upon behalf of the defendant, Martin Bracker, I make similar motion on the same grounds.
The Court: The same action; overruled, and exception.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf DAVID SILVERMAN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pilliod:

My name is David Silverman. I live at 2236 Franklin Avenue. I have lived in Toledo nine years. I am a cloak manufacturer. I am acquainted with Meyer Selzman. I knew him during March and April of this year; I have known him for about a year and a half. I have the means of knowing that his reputation was very good as to moral character in the community in which he lived.

Cross-examination.

By Mr. Evans:

I have known Selzman a year and a half. His place of business was within walking distance from my place of business, or a short car ride. My relations with him have been social ones. I have visited his home and he has visited my home. Our families have [fol. 136] visited. I saw him frequently. My business dealings with him did not amount to anything.

Mr. Binzer: In order to save time, I desire to introduce a character witness on behalf of the defendant Martin Bracker.
The Court: Very well.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf JACOB LEO GREENBAUM, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is Jacob Leo Greenbaum. I live at 2034 Warren Street. I have known the defendant Martin Bracker about seven or eight years. I think I have the means of knowing his general reputation and character in the community in which he lives. Martin Bracker worked for me for some time. I know him in a business way. I have been associated with him for some time as employer and employee. The reputation of Martin Bracker always seemed very good to me. He was a faithful employee.

Cross-examination.

By Mr. Evans:

I think I have the means of knowing Bracker's reputation. I have come in contact with people who knew him and talked about him—ever since I have known him. These people have said things about him that would lead me to believe that his reputation is good. Off hand I would not be able to tell the court and jury any one that I ever talked with. There are dozens of people I have talked to that know Martin and know me.

Q. Can you name any one?

The Court: In general, you associate with the people he associates with, is that so?

A. Yes, I do.

(Narrative:) I did associate with people he associated with, and do now. For instance, he is a member of the same church I belong [fol. 137] to. Hundreds of people belong to that church. They know him and know me. I don't know anything about his dealings in denatured alcohol.

Mr. Binser: I object to that question.

The Court: He has answered it.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf HENRY F. TABER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pilliod:

My name is Henry F. Taber. I live at 4029 North Haven, in Toledo. I have lived in this city about nine months. I am acquainted with the defendant Meyer Selzman and I was acquainted with him during March and April of this year. I am in the real estate business. I have the means of knowing Mr. Selzman's reputation for moral character in his community as it was during the months of March and April, last. My acquaintance with Mr. Selzman was social and I knew him at that time, having previously lived in the same apartment with him and his wife. His reputation was good.

The Court: Are you telling this jury what you think his character is, or are you telling this jury what you understand to be the reputation he has for character, which?

A. I am telling them my observation of Mr. Selzman's reputation as far as I could see it.

The Court: You mean reputation or character?

A. Character.

The Court: You are trying to give this jury your best judgment of his character, is that right?
A. Yes sir.

Cross-examination.

By Mr. Evans:

I would add that my testimony regards Mr. Selzman's reputation too. I was acquainted with people who knew Mr. Selzman and [fol. 138] talked about him in a social way. We lived in the same neighborhood.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf W. A. Gomer, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is W. A. Gomer. I live at 728 Noble Street. I have known the defendant Martin Bracker about seven years. I have come in contact with him very often, and have the means of knowing his general reputation in the community.
The Court: Have you come in contact with people who know him?
A. Yes sir.
The Court: You associate with them, do you?
A. Yes sir.
The Court: It is not what you know of him, but what you know of what other people think of him, that you are inquired about.
A. Yes sir.
Q. What is that reputation?
A. Very good.

Noon adjournment.

Colloquy Between Court and Counsel

At this juncture, a stranger to the case, Earl Tapp, a convict in another case, was called before the court for sentence which was duly imposed.

Mr. Breitenstein: There were some things that Your Honor said that I feel, since the jury has had the law of conspiracy brought to their attention, might affect their views of it in connection with the case on trial; that was the observation Your Honor made that when this defendant, who has just been before you, did not advise the authorities, he joined the conspiracy. I feel that you forgot to add [fol. 139] that he had to know at that time what was in there (in

the package presumably) or he would not have had any knowledge of a conspiracy; therefore, could not join the conspiracy unless he knew there was one in progress.

The Court: He need not have known that there was a conspiracy; all he need to have known were facts which suggested a felonious offense against the United States, whatever it may have been.

Mr. Breitenstein: You do not have to know who are in it, but you must know there is a conspiracy in progress, otherwise you cannot join it.

The Court: I do not think this affects this case at all. This jury is too intelligent to be disturbed by anything of that sort. There is nothing in the case now on trial so far as it has developed to this point—whatever may be the result in the future—nothing whatever which would make applicable to this case the law that featured, the law of conspiracy which was discussed in Tapp's case.

Mr. Breitenstein: There was one other remark I wanted to make: when Your Honor discussed the law about reporting a violation to the judge and to other federal authorities, that is also qualified by the Fifth Amendment of the Constitution; that no one is compelled to testify against or to accuse himself.

The Court: Certainly; that goes without saying. Proceed.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf ARTHUR COLLINS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

[fol. 140] My name is Arthur Collins. I live at 4228 Caroline Avenue, Toledo. I have known the defendant Martin Bracker about five years. I have the means of knowing his general reputation and character in the community by being associated with him in work. That reputation is very good.

Mr. Evans: No cross examination.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf WILLIAM HORWITH, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My mane is William Horwith. I live at 22 Kenilwood Drive. I have known the defendant Martin Bracker I should judge nine

years. As far as I know, he is a nice sort of fellow. I have the means of knowing his general reputation and character in the community. It is good. I am a business man.

Cross-examination.

By Mr. Evans:

My name is William Horwith. My business is barrels—cooperage. I have known the defendant Martin Bracker nine years. I have not met him socially. I have known him, seen him on the street, and other places. I did not do any business with him. I saw him quite often during the months of February and March of this year. I saw him on the street and places where he worked. I talked with him. He was never employed by me.

Q. Your opinion you have expressed here as to his reputation being good, is that formed from your meeting him and talking with him?

A. During the nine years I have known him, I knew he worked most of the time, and in my business, barrels, that took me to [fol. 141] drug stores and places like that. I know he worked on Adams Street for years, where I used to get some goods, that is, barrels, some work over there; and also the same thing brought me to Canton Avenue, inquiring for stuff. I knew him from there. I also did business with his father. His father is in the same line of business, on a smaller basis.

Q. And then your opinion about his reputation is derived from the fact that you knew he was working steadily, that you met him and talked with him and his father, is that right?

A. Also with him.

Q. That is the basis of your opinion, that his reputation is good, is that right?

A. Well, if it was otherwise, perhaps I would hear differently about him. He was a quiet boy, so far as I knew.

Q. But that is the basis of your opinion?

A. Yes sir.

Q. And that is all you base your opinion on, is that right?

A. General knowledge.

Q. From the knowledge you stated to me just now?

A. Yes, I would not know anybody else.

Mr. Evans: I ask that this testimony be excluded, Your Honor.

The Court: It is not valuable; it is not competent; it is withdrawn, excluded.

Redirect examination.

By Mr. Binzer:

I came into contact with a lot of the people whom Bracker knew. I have talked to these people that Bracker knew and whom I knew. I had at times occasion to mention Bracker's name.

Q. And the times you would discuss Bracker with these friends you and he knew, would they ever say anything contrary than good as to his character and reputation?

Objection.

The Court: That is cross-examination; objection sustained;

Exception.

[fol. 142] (Narrative:) I believe I have met Bracker in a lodge room. He is a member of one fratenity or order that I know of.

Q. Have you the means of knowing whether or not he is well regarded in that fraternity?

Objection.

The Court: That would be clearly improper; sustained.

Exception.

The Court: A man may be in good standing in a half-dozen, first-class fraternities. That would not mean anything.

Q. I will ask you whether or not, Mr. Horwith, you have had any dealings with any members of Bracker's family that would cause you to know the family pretty intimately?
A. Yes sir.

Objection.

(Narrative:) I did not have many occasions to know Bracker socially. I have not met him on any social occasions.

The Court: Call another witness. This is taking time for nothing.

Lodged December 22, 1924. B. C. Miller, Clerk U. S. Dist. Ct., N. D. O.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf MEYER SELZMAN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Breitenstein:

My name is Meyer Selzman. At present I live at 10834 Massey, Cleveland. I lived in the city of Toledo, Ohio, from June 7, 1923, until April, 1924. I am a married man. While in the city of Toledo, I conducted a drug store at 2002 Canton Street. I took charge of that drug store on June 7, 1923, and I conducted it up until April, 1924. It was the usual drug store, a prescription [fol. 143] pharmacy in every sense of the word, and I handled

articles usually handled in drug stores. I am a registered pharmacist. Previous to the time I came to Toledo, Ohio, I was working with the Wineberger Drug Company, Cleveland. I worked for that firm a little over a year. During the trial I have seen a man by the name of Martin Bracker. He was employed by me at this drug store, from the day I took the store, until April, 1924. I also saw Harry Porter here. He was employed by me I should judge seven or eight weeks. I also saw Aaron Libenthal. He was employed by me five or six days, perhaps seven, previous to the time the drug store was closed.

About the 19th of April I sold the drug store to Mr. R. J. Stone. During the time I conducted this drug store, I handled competely denatured alcohol; it was included in the stock. It was included in the stock when I took the store and I continued to handle it. I personally sold completely denatured alcohol.

Q. I will ask you whether or not you, at any time, sold completely denatured alcohol without placing on the container a label stating that there was a poison, or something to that effect, contained therein?

A. State the question again?

Q. Did you, at any time, sell completely denatured alcohol without placing a label on the bottle?

A. No sir.

(Narrative:) The label stated that the bottle contained completely denatured alcohol. I absolutely did not at any time instruct or direct Martin Bracker, Harry Porter or Aaron Liebenthal to sell or dispose of completely denatured alcohol without putting the proper label on the bottle. I recall very clearly the first day of April 1924. I remember the occasion on that day, when the police officers came to the store. I was not there when the officers arrived. I should say I came to the store about 10:30; between that and 11:00; along about that time, on April 1, 1924. On the inside of [fol. 144] the drug store I found officers Howard and McGuire. I also saw there the gentleman who testified this morning on the stand by the name of James Ryan. He was on the inside of the store. I remember federal officer Hasemeyer. I did not see him at the time I walked in. He came in, I should judge, fifteen or twenty minutes after I was there.

Q. Now, Mr. Selzman, you were in the court room and you heard certain officers, particularly the one I have in mind now, Officer Gloyd; I will ask you whether you remember this question. You heard the scholarly District Attorney Evans say, "Did you hear any conversation had between Hasemeyer and Selzman." And the answer was, "I heard a conversation between Hasemeyer and Selzman." The question: "State that in substance." The answer: "First they were standing near the front door. Hasemeyer said to Selzman, "Do you have a friend an undertaker?" He said, "No, What the Hell do I care." I will ask you, Mr. Selzman, whether or not you made such a statement to Mr. Hasemeyer within the hearing of Officer Gloyd.

A. Absolutely not.

(Narrative:) I absolutely did not use that language. I never do. I remember something was said to me about an undertaker. I cannot say the exact time when it was said, but it would be along about two or three o'clock in the afternoon. The place was in a private office in the detectives' office of the Police Station. Hasemeyer and myself were the only ones present in the room. Hasemeyer inquired something about an undertaker, and I cannot say just how relevant it was. My answer was, "My God, I did not know they were drinking it. If they were drinking it, how could I stop them. The reason they gave is that they bought it for cleaning purposes." I positively did not say, "What the Hell do I care."

Q. I have in my hand what is known as Government Exhibit 1; I will ask you whether or not you ever saw that bottle previous to the time when you saw it in the court room.

[fol. 145] Mr. Evans: Objection. There is no claim that he ever saw the bottle. There has been no attempt to introduce evidence that he ever saw that bottle.

The Court: No. I do not understand it that way.

Mr. Breitenstein: I do not have to disprove that, then all right.

(Narrative:) I never sold any completely denatured alcohol to James Ryan.

Q. Mr. Evans read to the jury an indictment which you heard him read, particularly one that is known as No. 4206, and in it there is written out the allegation that you and Martin and Bracker and Harry Porter did conspire, combine, confederate and agree together, between the time of the first day of March, 1924, and the second day April, to violate the National Prohibition Act, in that you would sell denatured alcohol and intoxicating liquor for beverage purposes. I will ask you, Mr. Selzman, whether or not you ever sold denatured alcohol for beverage purposes.

A. No sir.

(Narrative:) I did not instruct or direct any of my employees, namely, Mr. Bracker, Mr. Porter or Liebenthal to sell denatured alcohol for beverage purposes. There was not at any time sold in my place of business denatured alcohol for beverage purposes. I never instructed Martin Bracker, Harry Porter or Aaron Liebenthal specifically on the subject of placing labels on bottles in which there was sold completely denatured alcohol. The clerks understood that anything, whether it was denatured alcohol or asperin tablets, would be and should be labeled before it went out. The sum and substance of the label is that the bottle contained completely denatured alcohol as a violent poison, not to be applied externally to human or animal tissues without seriously injurious results; that it could not be taken internally without inducing blindness and general physical [fol 146] decay, ultimately resulting in death. I had such labels in the store and I kept them there for this purpose.

Q. You heard it said in this court room, Mr. Selzman, that you gave some directions or instructions to Mr. Harry Porter that when

a well dressed man came into the drug store and asked for completely denatured alcohol, this label should be placed on the bottle; and if a man who looked like a working man, or, as the word has been used—I dislike to use the word bum against any human being—but that has been used in the case—that the label should not be placed upon the bottle. Did you ever have a conversation with Porter on that subject, or did you ever give him any instructions or directions to that effect?

A. No sir, there were no such instructions, or conversations of the kind.

(Narrative:) I never gave instructions or had conversations like that with any of my employees, Bracker, Liebenthal or Porter. I do not know, except from what I have heard in this court room, that any practice like that occurred in my drug store.

Q. I hold in my hand what is known as Government Exhibit 5, brought into the court room by District Attorney Evans. It purports to be a statement signed by Harry Porter, one of your employees. It states to this effect: "That I was employed by Selzman at the rate of thirteen dollars a week, and have been employed by Selzman for about seven weeks, as messenger and some clerical work. While I was employed by Selzman I sold half pint bottles not to exceed ten bottles. Toward the end, I sold bottles without labels. This was with Selzman's knowledge, as he could not help seeing me fill prescriptions. Selzman did not specify to put any labels on bottles unless they were well dressed people; but I did not wait on many well dressed people, as I referred them to the other clerk, Bracker, or to Selzman. Selzman never mentioned to me to [fol. 147] put any names in a book about alcohol." I will ask you whether or not, first, you ever gave him any instructions, or whether or not you had any knowledge that Mr. Porter, if he did sell denatured alcohol without labels, whether or not you had any knowledge of that fact?

A. No sir.

(Narrative:) I did not give him any such instructions as he says. I never had any conversation with him on the subject of well dressed people. I never entered any names in the sales books. It was not required in so far as I know. I had a list of the poisons in my drug store, as to those that had to be entered in a book, from the standard poison register of Ohio. I always had this list and I had it at the time I conducted this drug store. I did not find in it that either denatured or wood alcohol was one of the articles that had to be registered. There were some things entered in the sales book. They are the poisons sold that are named in the list. It was my practice, when people came in and asked to purchase denatured alcohol to inquire the purpose for which they were to use it. As a general rule, I did not have to ask; they would state right after they asked for it. Generally they said it was for cleaning, painting or burning in alcohol lamps. Most of them looked as though they were artisans or mechanics.

Mr. Evans: Objection as improper examination.
The Court: Yes, that is a cross-examining the witness.

(Narrative:) By the nature of their appearance and manner of dress, one would think they were painters, chauffeurs, automobile users, drivers or mechanics; and quite a number of colored people would use that to burn lamps with, and to use in straightening combs for their hair. That is the best method of heating and straightening combs.

[fol. 148] The Court: The colored people would use it for that purpose?
A. Yes, sir.
The Court: But the machanics, would they buy it for that purpose?
A. No sir, those people like that would use it in their work.

(Narrative:) We had calls for it for automobile uses, for the motor in cold weather. I know as a result of my experience in the drug business, my knowledge of chemistry, and as a pharmacist, the purposes for which denatured alcohol customarily is used. It is used mostly in the industries. In cold weather, for radiators, to keep them from freezing; for burning in combustible lamps; in dissolving shellac and paints; and various other industries use it. Purchasers gave reasons or purposes such as I have related. There was nothing about the appearance, or anything that any one said or did, who bought completely denatured alcohol from me, or under my observation, that would give me the impression that it was to be used for beverage purposes. Had they given me that impression, they could not have bought it.

Q. You heard the statement read here, by Martin Bracker, about a man or woman coming in not well dressed—that you should not put a label on the bottle; did you ever give him those instructions?
A. No sir.
Q. I asked for that before, but I want specifically to refer to the statement of Bracker made at the Police Station, so that it might not be used in argument that I did not ask for this: I am asking you specifically whether such instructions were given by you at any time?
A. No sir, there were no such instructions.

(Narrative:) I did not conspire or enter into a combination with any of these employees, or any one else, to sell denatured alcohol for beverage purposes. I did not combine, conspire or agree with any of these boys, Bracker, Porter of Liebenthal, to sell, dispose of, [fol. 149] completely denatured alchol without placing a label on the bottle. I never had any talk with them about doing the things that they stated in here were done, contrary to law. I handled completely denatured alcohol absolutely as any other branch of the drug business.

Q. And in addition to the conspiracy count in No. 4206, it says that you and Bracker and Porter sold, between the 30th day of

March, at Toledo, Ohio, one-half pint of denatured alcohol to a man by the name of Tommy Callahan; did you make such a sale?

A. Does it mention me specifically?

Q. It mentions all of them; I will ask you do you recall of ever having made such a sale?

A. No sir.

Q. Do you have any recollection as to whether or not you sold it, or observed any of your employees sell, on the 30th day of March, 1924, one-half pint of denatured alcohol to Tommy Callahan, under circumstances from which you and the other defendants might reasonably have deduced the intention of said purchaser to use said denatured alcohol for beverage purposes?

A. No sir.

Q. Referring to Count 3 now; it says you and Bracker and Porter, on or about the first day of April, 1924, did sell to Tommy Callahan one pint of denatured alcohol under circumstances from which the said defendants, namely, you and Bracker and Porter, might reasonably have deduced the intention of said purchaser to use said denatured alcohol for beverage purposes?

A. I was not present in the store on April 1.

Q. You did not sell, or have a recollection of any sale, under those circumstances?

A. No sir.

[fol. 150] (Narrative:) I did not make or authorize or know anything about a sale on or about the first day of April, to James Ryan, of one-half pint of denatured alcohol, under circumstances from which there might reasonably have been deduced the intention of the said purchaser to use said denatured alcohol for beverage purposes. I did not make or authorize or know anything about a sale, on the 30th day of March, to Philip Thomas, of one pint of denatured alcohol, under circumstances from which there might reasonably have been deduced the intention of said purchaser to use said denatured alcohol for beverage purposes. I remember that Thomas was in here. I do not remember selling him any alcohol at all. I do not quite recall his face. I cannot definitely say that I waited on him; under the circumstances, I never would have sold him any.

Q. Count 6 says that you, Bracker and Porter, on or about the 30th of March, 1924, sold to a man by the name of William Cronan some large quantities of denatured alcohol; and to another man, whose name is to the grand jury unknown, under circumstances from which you might reasonably have deduced the intention of said purchasers to use said denatured alcohol for beverage purposes. I will ask you whether or not you authorized or made those sales under such circumstances?

A. No sir.

(Narrative:) I did not have any knowledge of those sales. I do not know that any of my employees had any knowledge that any denatured alcohol was sold to William Cronan from which they would know it was going to be used for beverage purposes.

Q. Here is Count 7 of the Indictment 4206. It says that between the first day of March, 1924, to and including the second day of April, 1924, you conspired with Bracker and Porter, combined with them, confederated with them, agreed with them, and one agreed and combined with the other, to commit an offense against the United States, that is, a violation of the National Prohibition Act, Second Title of it; and that you would sell denatured [fol. 151] alcohol unlawfully for beverage purposes, under circumstances from which you and the other two boys would know, or might reasonably have deduced the intention of the purchaser that they were going to use it for beverage purposes. I will ask you whether or not you ever had any agreement with them?

A. No sir.

(Narrative:) I never talked with them about it. I never had a meeting of the minds with them. I never gave them any directions or instructions about it. I never talked about it. I never planned about it. It was never the subject of a discussion in the conduct of my store any more than anything else would be. I positively had no talk of violating the prohibition law and selling denatured alcohol for beverage purposes. I had no understanding with the others whatsoever about this.

Q. Another one here, 4172. This one shows that they have another name in this one they left out of the other one. It says that you, Bracker, Porter and Liebenthal, on or about the first day of March, 1924, and ending on or about the second day of April, 1924, did conspire with these three boys, combine with them, confederate with them, agree with them, and one agreed with the other, to commit an offense against the United States, that is, that you would unlawfully, knowingly, wilfully and feloniously violate the Act of Congress of October 28, 1918, known as the National Prohibition Act, and that you would violate the Third Title of that Act, in that you would sell this denatured alcohol without putting any labels on, particularly the one label I read. I will ask you whether or not you ever had any talk, understanding, instruction, direction, or anything of that kind, whether your minds met there, whether you told them to do something and they agreed on that subject?

A. No sir.

[fol. 152] Q. Nothing whatsoever?

A. No sir.

(Narrative:) There was no plan, formulation of a plan, or anything of that kind. I never sold a bottle of denatured alcohol to James Ryan without a label on. I never saw the man. I did not have any knowledge of such a sale. I did not give any instructions with regard to such a sale. The sale was not made in accordance with instructions that I gave.

Q. It says here in Count 2 of this that you did sell and offer for sale, and did cause and procure to be sold and offered for sale, and did aid, assist, abet, counsel and advise in the sale of, and in the

offering for sale to Philip Thomas, James Ryan, William Cronan, Jack Davis, William Hickey, James Carter, and to divers other persons—of course, we do not know who they are; they do not know themselves—large quantities of completely denatured alcohol in packages containing less than five wine gallons, and did not put on any labels. I will ask you whether or not you ever sold, offered for sale, procured to be sold, or did aid, assist, abet in the sale of denatured alcohol to any of the persons named here?

A. In those circumstances?

Q. Without placing a label on the bottle?

A. No sir.

Mr. Breitenstein: You may inquire.

Cross-examination.

By Mr. Evans:

(Narrative:) I bought this drug store in June, 1923. I sold it in April, 1924. I am not sure of the date. It was after I was arrested. It was a prescription pharmacy. I am a registered pharmacist. I do not employ any registered pharmacist as an assistant. No one, to my knowledge, filled any prescriptions outside of myself; I was there most of the time. I sold quantities of completely denatured alcohol. I do not know offhand how much completely denatured alcohol I sold in March of this year. I should [fol. 153] judge about fifty or sixty gallons. I sold denatured alcohol both in small and large quantities. I sold in large quantities mostly to automobile users putting a whole gallon into the motor. By a large quantity, I mean a gallon and half gallon lots. I myself sold different quantities of completely denatured alcohol to a great number of people during the months of December of last year, and January, February, March, of this year. I cannot tell you from memory exactly to whom I sold every package and every bottle. I do not know whether or not I ever sold alcohol to Ryan, not possibly; I believe that I never saw the man until the first of April when I saw him in the store. I saw Cronan in here and heard him testify. I might have sold him completely denatured alcohol. I have seen Thomas and heard him testify. I cannot say that I did not sell him any alcohol. I saw Jack Davis in here. I believe I did sell some to him. I do not know a man, by name, of James Carter; therefore, I cannot say whether or not I sold any denatured alcohol to him. I stated that in every instance I put a label on the bottle when I sold completely denatured alcohol. The label you have shown me is about the same as the one I used; a little larger. It contained the same wording, outside of the words "R. & B. Company, General Pharmacists." The words are printed by a firm and they would be about the same. As I look at this example you have shown me, I believe that is about the exact wording of the label. I knew that the law required that I put a label of this sort on every bottle of completely denatured alcohol, on every package that went out of the store under five gallons, and on everything

else that went out of the store. I knew that to be the law with respect to this completely denatured alcohol. Completely denatured alcohol is poisonous. I knew it. When I stated to my counsel that I never instructed the clerks specifically, I meant I never told them to do as stated in those statements. I never discussed it. I never told [fol. 154] them not to put labels on. It is the regulation to put labels on. I did not tell the clerks not to put labels on the bottles of completely denatured alcohol. I did not tell them to put them on or not to put them on. I did not, in so many words, tell them to put the labels on. I knew they were selling it. I dare say I saw them sell it. I was under the belief that they did put labels on, the same as on anything else; that applies to everything that comes out of the drug store; not only completely denatured alcohol. Porter worked for me seven or eight weeks. I thought he was about eighteen. I did not know whether or not he had had any experience in a drug store when I hired him; I believe he told me he never worked in a drug store. He had no orders to sell denatured alcohol. I believe I did know he was selling it. I was under the impression that he put labels on. I did not tell him to put labels on. It was my custom to ask purchasers for what use they intended this completely denatured alcohol. I believe I said that I remembered selling denatured alcohol to Jack Davis. I cannot say how many time-; several times. I asked him what he wanted it for; I do not believe I had to ask him; he stated what he wanted to use it for. He said for cleaning purposes. A large number of men, poorly dressed, came into the store and bought completely denatured alcohol. I want this court and jury to believe that I asked—when I myself sold them—every one of them, what he intended to use it for, or else that he would tell me what he wanted to use it for. In most cases, they would tell me. On several occasions I refused to sell any completely denatured alcohol. I cannot say whether or not I ever refused to sell to Davis. I thought that these poorly dressed men who came into my place with empty bottles and handed them to me were going to use the alcohol for cleaning purposes.

Q. Did they look as if they needed to clean something?

A. Yes sir.

[fol. 155] Q. They were not very clean themselves, were they?

A. A painter or a window cleaner or anyone like that would not be very clean.

(Narrative:) I thought they were going to use it for some kind of cleaning. In answer to my counsel's question, I stated that I recall Hasemeyer's asking me if I had an undertaker friend. That part of his testimony is correct, except, perhaps, not the identical words. Substantially, it is correct. He made reference to it. In reply to that statement by him, I told him in about these words: "My God—I did not think they were using it for drinking. I sold it for cleaning purposes. If they took it out and drank it, how could I know?"—words to that effect. When I told him this, I was in a private room in the detectives' office; I forget which

floor. Mr. Hasemeyer was there; nobody else was there. Mr. Hasemeyer and I were there. I am certain about that.

Q. You are just as certain about that as you are about the rest of your testimony, is that right?
A. Absolutely.
Q. And any more so?

Objection.

(Narrative:) Bracker had been working for me ever since I bought the store. I paid him $32.50 a week. I believe Porter's salary was $14.00. Bracker would be on duty one day from noon to closing; the next day he would open up, I guess, and work until about six.

Q. Mr. Selzman, did you read in papers along about the first of April or the latter part of March of this year, anything about some people who had been using completely denatured alcohol?

Mr. Breitenstein: Objection. I can anticipate the purpose of that question. I do not think it is material and proper. It would not be proper here because there is no evidence before the jury that the result which he claims was the result of this completely denatured alcohol.
[fol. 156] The Court: I do not think we have come to that bridge yet. This question may be simply to identify an occasion, or something of that sort.
Mr. Breitenstein: If it does, it is improper also.
The Court: Not in the form of the question. He may answer the question by yes or no. I see what you have in mind, but we are not there yet.
Mr. Breitenstein: It is just as fair to ask him if there was a basketball game on that day.
The Court: He may answer that.
Mr. Breitenstein: Exception.

A. I would have to qualify that yes or no.

The Court: Answer it with whatever qualification occurs to you.

A. On second thought, I would make it no; not in that way.

(Narrative:) I do not recall having a conversation with Bracker regarding people who had been buying completely denatured alcohol in drug stores, on or about the 30th day of March.

Q. Did you, on or about the same date, have a conversation with Bracker about people who had been buying completely denatured alcohol from any source?
A. If you are referring to Sterno Canned Heat, or did you mean straight completely denatured alcohol?
Q. Denatured alcohol.
A. No sir.

Q. Did you have some conversation with him then about canned heat?

A. I did not have any conversation. That is qualified, I was going to——

Q. But you had no conversation with Bracker, either about canned heat or completely denatured alcohol, is that right?

A. No sir, no conversation.

[fol. 157] (Narrative:) I have been a registered pharmacist for a year at least, I believe. I had been employed in a drug store about six years before I became a registered pharmacist. I was employed as a clerk. I stated that I came into the drug store the morning I was arrested between 10:30 and 11:00. I was all alone; nobody was with me. I am sure that nobody came in with me. There might have been someone following me, which I cannot recall. Nobody came up to the store with me; I was alone in the car. I found in the store Officers McGuire, Howard; James Ryan, Bracker and Harry Porter; nobody else. It is not a fact that when I was taken to the Police Station and questioned, that I was questioned by Hasemeyer, by Howard, and by McGuire, and that at all times all of these men were present when I was being questioned.

Q. And is it not a fact that, at the Police Station, the only statement you made to anybody was that you were twenty-five years old, lived at 1952 Franklin Avenue, that you were in the drug business at 2002 Canton Avenue, and that you refused to answer any further questions?

A. No sir.

(Narrative:) That is not the truth. I will tell you. I got in there along about, I should judge, 2:30 or 3:00 o'clock. I understood that they had questioned Bracker and Porter. Several men came in; the arresting officers and a man sat at a typewriter and began to take testimony. Something happened and the men were called away. Then officer Hasemeyer was left with me. Then Hasemeyer left and McGuire came in and asked me if I wanted to make a statement. I said no. He said, "If you don't want to make a statement, go downstairs." That is all, except the little conversation that Hasemeyer had when he was in the room with me; I have already quoted that.

Mr. Evans: That is all.

Mr. Breitenstein: That is all.

[fol. 158] Mr. Evans: I want to offer in evidence this label, offered by Selzman, as being identical, except for the firm name and address on the bottom.

The Court: All right. Just as the kind of label used.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf MARTIN BRACKER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is Martin Bracker. I live at 306 East Bancroft Street. I am 24 years old. I am a clerk in a drug store. I have gone to school about a year and half or two years. I went through eight grades, and went a week to high school. I never finished a course in high school. I was about sixteen or seventeen when I quit school. Then I started to work as an errand boy for Kirschmaier Pharmacy. I worked there three and one-half years. I clerked around the store there and sold different things, toilet articles and so on, patent medicines, and waited on the soda fountain. That store was sold to Mr. Newcomber and I stayed there and worked. I worked there eight months. I did not leave that place, but Newcomber sold all his stores, and that store was included, to Liggett of New York, the chain store man. I stayed at the same place and worked for Liggett for two years. This store is at 601 Adams Street. I worked there about six years altogether, I guess. From there I went to work for J. L. Greenbaum at 2002 Canton Avenue. I worked for him until June 7, 1923, and then I worked for Meyer Selzman. His drug store is at 2002 Canton Avenue, the same location. I was there until April first or second, 1924.

My duties at the Greenbaum drug store were the same as at Kirschmaier's or Liggetts', my former employers, just working around the store. My duties at the Selzman drug store were the same as on previous occasions. I am not a registered pharmacist. [fol. 159] While in the employ of Selzman I did sell completely denatured alcohol quite a few times. I think I know one or two of the parties to whom I sold denatured alcohol by looking at them; I know only one by name. I would sell on the average of five or six or a little more a day; on the average of seven or eight, something like that; I cannot say just how many. I sold denatured alcohol to a man by the name of Ryan on the first day of April, 1924. I asked some customers, when I sold them denatured alcohol, for what purpose they were using it. The answer they gave me was for cleaning purposes. I cannot remember the faces of the people who came in to buy denatured alcohol, but from their look,—I just happened to look at their appearance,—and they looked to me like the same crowd of people.

Q. Did you ever look at their faces?
A. No sir, only——

The Court: What people are you talking about now?
Mr. Binzer: Those who purchased denatured alcohol.

The Court: All looked about a like, did they?
A. Yes sir, shabby looking, etc.

The Court: Shabby looking?
A. Yes sir.

(Narrative:) I heard the witnesses Philip Thomas, Ryan, Carter, Davis and Hickey testify in this room yesterday and to-day.

Q. Do you recognize any of them as being purchasers of denatured alcohol?
A. Yes sir.
Q. Did you ever sell them any?
A. Yes sir.

(Narrative:) Two parties I can remember I sold denatured alcohol to. One I remember as being frequent. I do not know him by name. It was the one that last testified here—the tall fellow. [fol. 160] It was not Ryan; it was the one that testified yesterday, the tall fellow; I guess it was Cronin. He first came in to purchase the stuff in February or March—something like that—I cannot remember the days. He said it was for cleaning purposes. I asked him for what purpose he was buying it; his answer was for cleaning purposes. He used to buy between a half pint and a pint,—something like that,—I cannot say for sure. The price was twenty-five cents a palf pint. I do not recognize any one else among these other witnesses, except the two I have mentioned: James Bayn, I know from general experience, and the incident of April 1, when we were arrested; and the other fellow I have mentioned. I never knew the other one's name. I do not remember that I ever saw Ryan before that morning. That day he purchased a half pint of denatured alcohol. He gave me a dollar bill. Government Exhibit 3 is a dollar bill. I do not see how I can identify it. Ryan tendered me a paper dollar bill.

Q. I will show you this Government Exhibit 3 again, and ask you whether or not this looks like the dollar bill, or is the dollar bill, he tendered you?
A. There is no way of my telling; I would not say for sure.

(Narrative:) I do not remember that I had any conversation with Ryan when he came in to buy this bottle of denatured alcohol. I was standing right behind the show case or counter. He came in and pulled out a half pint bottle, an empty bottle, and brought it across the counter, and I just simply from smelling of it,—it smelled like denatured alcohol,—imagined that was what he wanted, so I went to the back room and filled it up for him. I do not remember hearing him say anything at all.

The Court: And you put no label on it?
A. No sir.

(Narrative:) At times we furnished our own bottle to the customers who came in to our place of business. I charged additional for it. When we furnished our own bottle, I did at times label it denatured [fol. 161] alcohol. People usually bought between a half pint or a pint; sometimes half a gallon or gallon lots.

The Court: The gallon and half gallon lots were for what purposes?

A. They claimed they had their machines outside; they used it in their machines.

The Court: There was not much of a demand in March?

A. No sir.

The Court: That would be a cold weather demand?

A. Yes sir, it would start in December or January, to my knowledge.

(Narrative:) On April 1, 1924, at about 9:00 A. M., after James Ryan came into Selzman's drug store, and I gave him that bottle, sold it to him rather, and gave him seventy-five cents change, three or four minutes later two other men came in and one of the fellows showed me his badge that he was an officer. He pulled out a bottle and asked me if I knew what it was. I said, "Yes, it looks like a bottle I just sold to a person, and it was filled with denatured alcohol." He asked me if I sold it; and I said "Yes." He mentioned to some other officer and said to bring him in. I did not know whom he referred to until I saw Ryan with the other officer. He asked me if I remembered him. I said, "Yes." He asked me if I sold it to him. I said, "Yes, I did." He asked me if I ever said anything before he handed me the bottle. I said, "No sir." I do not quite remember if he asked me how I happened to give it to him without him saying what he wanted it for. But afterwards, he said, "Did you label that bottle?" I said, "No." He said, "Why not?" I said, "I was under instructions not to label the bottle."

Mr. Binzer: That is all.

[fol. 162] Cross-examination.

By Mr. Evans:

The signature on Government Exhibit 4 is mine. (Witness reads a paper.) I made the statement contained in that paper to officers Howard, Murphy, McGuire, Hasemeyer and Kruse on or about the first day of April of this year. This paper sets forth correctly and accurately the statement I made to those officers that day. I do not quite remember the date when I started to sell this completely denatured alcohol without labels. I think it was around the first of March or the end of February—something like that. Prior to that time I used to place a label on the bottle, take the person's name sold, for the register, and ask him for what purpose he wanted it. For the register I used a common, ordinary notebook, and we put a completely denatured alcohol label on top of it so that we would know. Government Exhibit 6 is the note-book to which I refer. Along in February, Mr. Selzman, my employer, instructed me that I should not put any more labels on bottles of completely denatured alcohol.

I changed my practice of asking people for what use they intended this completely denatured alcohol because of the same instructions

at the same time. After that time, I did not ask any one what he wanted this denatured alcohol for. After February of this year, I did not put any more labels on the bottles.

Q. And that was by reason of the instructions you had received from your employer, Selzman?

Objection; overruled; exception.

A. Yes sir.

Q. Do you know whether or not Selzman gave Harry Porter any instructions about putting on labels?

Objection.

The Court: He may answer.

Exception.

A. I do.

[fol. 163] (Narrative:) I know it because it happened to be on one occasion, the first time Harry Porter started to work there, and from the appearance of the young man, he looked like a nice chap. I suggested to Selzman in some way about not letting the young fellow mingle with the same crowd, the shabby looking bunch. He said, "That is all right; he knows all about it. I explained to him about not putting the labels on." That is the substance of the conversation. It occurred a few days after Harry Porter started work there; I don't remember just when it was. In the latter part of March I had a conversation with Selzman about selling denatured alcohol without labels. This conversation was held right in the store when there were no customers in the store. Just Selzman and myself were present. I asked him how come he instructed me about not putting labels on. He said, well, he did not want to have, in case one of the fellows was pinched, or something like that, or found somewhere groggy and pinched, to have them find a bottle with his label on it; that it might cause inconvenience and trouble. At the same time he suggested to me I should mind my own business, as I was getting my wages, and that I would not be responsible for anything. In his instructions to me, Selzman said something about prospective purchasers being well dressed or poorly dressed. He said, at the same time when we talked about not putting labels on, he said, "Of course, there are exceptions. If a woman or some other person comes in and looks respectable and so on, you better see that you get their name and put it down in a book, etc." There was no conversation when Ryan came in that morning to buy the half pint. He handed me the bottle; I filled it; he paid me; I returned the bottle to him; and he went out. Prior to that time, a great many other people had come in and simply handed me a bottle without any conversation, and I had filled it. I returned it to them without a label, taking the money.

[fol. 164] Q. What was your custom as to wrapping up these bottles of denatured alcohol before you gave them to the purchasers?

Objection; overruled; exception.

A. They were not wrapped up at all.
Q. Not at any time?
A. Sometimes we did.
Q. What was the practice with respect to wrapping up bottles in December and January?

Mr. Binzer: Objection. It is immaterial entirely.
The Court: He may answer that.

Exception.

A. In fact, I wrapped up on several occasions; even in March also.

(Narrative:) I did not fill any prescriptions while working there. Mr. Selzman filled the prescriptions.

The Court: Did you have much of a prescription business?
A. I could not say, sir; I expect there were about four a day or something like that.
Q. How many sales of completely denatured alcohol would you say you would average in a day?

Mr. Binzer: That has been answered.
The Court: He may answer. Go on.

(Narrative:) Referring to myself, six or seven daily—something like that. I guess twelve or more sales a day would be averaged by all the people working there. I did not keep track of what somebody else did.

Objection; overruled; exception.

(Narrative:) I have seen a bottle that looks like Government Exhibit 1 before. I saw it at Selzman's drug store. I have seen a great many similar bottles brought in there.

Q. Did you ordinarily furnish the bottle to the purchasers of this completely denatured alcohol, or did they furnish it?

Objection; overruled; exception.

[fol. 165] (Narrative:) At times they furnished it and at times they did not have a bottle and bought and paid for the bottle. We charged extra for the bottle. The charge was between five and ten, depending upon the size of the bottle.

Mr. Evans: That is all.

Cross-examination.

By Mr. Pilliod:

I do not remember that I have had any quarrels with Selzman. There was no ill feeling between Selzman and me during March and April while I was in his employ. There is an ill feeling between us now. I have a reason for it; I will state the reason.

Q. I am only asking you as to the fact?
A. Yes sir.

(Narrative:) I had different shifts every other day at the drug store during March and April of this year. On the day of the visit by Ryan, my hours were from seven thirty in the morning until about six o'clock in the evening. That was on April first. It was Tuesday, I am pretty sure. I was not working on April second. Prior to that time, before the arrest occurred, I started at 12:00 o'clock noon, and was supposed to work until 11:00 o'clock closing time. The following day the shift was from 7:30 in the morning until 6:00 in the evening. The following day from 11:00 until 12:00 at night. I do not exactly remember Porter's hours on the same days; he worked days mostly, to my knowledge. I am sure of it.

On April 1, I was together with Porter. Prior to that time, in the afternoon, the whole crew was on; Selzman also. My understanding was that men purchased denatured alcohol for cleaning purposes; that was always my understanding.

Q. You never had reason to think they were drinking it, did you?
A. I never stated any reasons at all; I might have had something in my mind; but there was no stating at all.

(Narrative:) I never discussed the question with anybody. I did [fol. 166] at one time discuss it with Selzman.

The Court: With whom?
A. With Selzman.

(Narrative:) I did not discuss it with Porter. I am pretty sure Porter was not there at the beginning of January of this year There was another employee besides myself, Porter and Liebenthal. I guess his name is Hollis Farley. There was no young lady that I know of employed there.

Mr. Pilliod: That is all.

Cross-examination.

By Mr. Evans:

Q. You knew that the law required that labels be put on bottles of completely denatured alcohol sold to purchasers, did you not?

Objection; overruled; exception.

A. No sir, I did not.

Q. Why did you think that they were originally put on bottles in Selzman's drug store?

Objection; overruled; exception.

A. From general experience around a drug store, especially in Liggett's, where they had a rule hung up around the place that

under no circumstances liquids like these should go out of the store without having their labels on,—anything that contained poisons."

(Narrative:) I knew that completely denatured alcohol was a poison from looking at the label; I always saw the skull and bones. There is now some ill feeling existing between Selzman and me. I had an ill feeling against Selzman before I signed the statement. One reason for this ill feeling is,—I figured I got myself in a mess here, where I did not realize anything out of it. Also, when Selzman failed to pay me for a couple of days, two days prior to the day of the arrest. I was after him for two or three times and he told me to come back for it, and the next time he would pay me. This ill feeling has not caused me to testify untruthfully in any way [fol. 167] concerning anything in this case. It did not cause me to say anything false or untrue in the statement I made to the officers on April 1. The real reason for my ill feeling against Selzman is because I think that he got me into this mess, and I blame him for it.

Q. And you blame him for it because you, in selling this denatured alcohol without labels, acted under his instructions, is that right?

Objection; overruled; exception.

A. Yes sir.

Mr. Evans: That is all.
Mr. Pilliod: Nothing more.

Redirect examination.

By Mr. Binzer:

I left school because I was working at that time in Kirschmaier drug store. Mr De Haven was managing the store. I was late for work because I went to high school. High school did not get out until one fifteen or later and I had to report to work at two promptly. He said, "You will either have to continue with your studies or leave this place and the work." At that time I was a young fellow and did not take the educational side into consideration. I looked on the money side of it and quit school.

Q. On account of the financial condition of your family?

Mr. Pilliod: Objection. It is immaterial, irrelevant, of no weight.

(Narrative:) Mr. Selzman did not promise me any bonuses, or say he would give me any for working for him, but he gave me twenty-three dollars as a Christmas present: three per cent of my wages. That was the Christmas of 1923. He figured three per cent of my wages. I did not ask him for anything; I did not expect anything; but that day he gave it to me. He has not given me anything since as a bonus.

Mr. Binzer: That is all.
Mr. Pilliod: That is all.

[fol. 168] REBUTTAL

Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal A. L. HASEMEYER, who being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

I did not question Selzman alone in the police station in Toledo on April 1. He did not, in the police station or any place else on that day, make any statements to me alone. While in the police station at one time, there were present the four officers, Howard, Gloyd, Murphy and McGuire, and also Officer Scarletto, the man who operated the typewriter in taking the statements. Then Officers McGuire, Howard, and Captain McCluskey were together at another time; and then Captain McCluskey and myself. Selzman refused to make any statement—and Officer Scarletto was at the typewriter. He got as far as the statement goes, and he refused to answer any more questions. I recall that when I testified yesterday I stated that I asked Selzman if he had an undertaker friend. That conversation occurred at the drug store at the corner of Canton and Woodruff Streets, 2002 Canton. His reply was not, substantially, My God, I did not know what they were using it for. I thought they were using it for cleaning purposes. He did not say substantially that to me at any time. I did not hear him say that to anyone else at any time.

Mr. Evans: That is all.

Cross-examination.

By Mr. Breitenstein:

I have been in the court room during this trial. I was in the court room part of the time when officer Gloyd was on the witness stand.

[fol. 169] Q. In connection with anything that Meyer Selzman may have said to you, I will ask you whether or not he said, What the Hell do I care?

Mr. Evans: Objection.

The Court: The objection is valid to this question. It does not conform to anything asked on direct examination in rebuttal.

Q. I will ask you if you know exactly the language used at this time and place?

Objection.

The Court: That has not been asked in direct examination.

Mr. Breitenstein: They are contradicting that Selzman said on the witness stand.

The Court: That is right.
Mr. Breitenstein: Just pass that.

(Narrative:) I did not make any notation or memorandum on this particular day as to all the interviews I had, the places where I had the interviews, and the persons there at the time. I am one of the federal prohibition officers located in the city of Toledo. In connection with my duties I have many cases to investigate and to write reports upon, and to keep the facts in my memory Cases I may have handled six months ago, that is, since April 1st may run probably into the hundreds. Sometimes, it may be that, without any intention, while I may have the substance in my mind, I may be mistaken about some of the details. I might be mistaken about the men who were present; but not about the questions. I might be mistaken as to who were there at the time. I could not have happened to be temporarily alone in the room. I had the stenographer right with me; but with him, I might temporarily have been alone in the room.

Mr. Breitenstein: That is all.

[fol. 170] Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal C. E. Howard, who, being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

I testified yesterday that I heard a conversation between Selzman and Hasemeyer in which Hasemeyer asked Selzman if he had an undertaker friend. This occurred at his drug store, 2002 Canton. I took part in questioning Selzman at the police station that day. I won't say that I was present at every one of the times he was questioned, but when he went to make a statement and to get a statement from him, I was asking him the questions. I never heard Selzman say substantially this: My God, I did not know what they were using it for, or I would not have let them take it out. I thought they were using it for cleaning purposes. I did not hear him make the statement either in the police station or in the drug store.

Mr. Evans: That is all.
Mr. Breitenstein: No cross-examination.

Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal JAMES RYAN, who being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

Q. You testified here this morning?
A. Yes sir.
Q. I will ask you whether or not, at any time when you purchased completely denatured alcohol from Selzman or any of his clerks, namely, Porter, Bracker, you told them you were going to use it for cleaning purposes?
[fol. 171] Mr. Pilliod: Objection. It is alleged here he purchased from only one man, Bracker. He claims now——

A. No sir, I never told him.

Exception.

Q. Were you ever asked when you made a purchase there, for what purpose you were going to use this completely denatured alcohol?
A. No sir.

Cross-examination.

By Mr. Pilliod:

I am James Ryan. I am now living at the County Jail. I have been living there for six months and ten days, ever since this case started. Cronan is there and the other men. They have been there since the case started.

Redirect examination.

By Mr. Evans:

Q. In what capacity are you in the County Jail?

The Court: This man is not in jail because he has commit-ed any crime; simply held as a witness for the government. The law and practice authorizes the court to act as a bond for appearance, and we thought best to do it in this case. He has not been able to give bond, so he has been held as a witness, and he will be entitled to draw witness fees and per diem.
Mr. Evans: That is all.
Mr. Pilliod: That is all.

Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal PHILIP THOMAS, who, being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

[fol. 172] My name is Philip Thomas.

Q. I will ask you whether or not, at any time when you purchased completely denatured alcohol, at the drug store, of either Selzman or his clerks, Porter or Bracker, you ever told them, or any of them that you were using it for cleaning purposes?

Objection.

Mr. Schwartz: This man made no purchase at the drug store.

The Court: Did you make any purchase of it?

A. No sir.

Mr. Evans: I am confused. Bring in Mr. Cronan.

Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal WILLIAM CRONAN, who being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is William Cronan. I testified here yesterday. I testified that I purchased completely denatured alcohol at the drug store of Mayer Selzman about thirty-five or forty times. I solemnly swear I never at any time told any of them that I was going to use it for cleaning purposes. They never asked me what I wanted it to use for.

Q. Did they ever ask you for what purpose you did intend to use it?

A. No sir.

Cross-examination.

By Mr. Pilliod:

I started buying denatured alcohol at Selzman's place around the fifth of February. I do not know the exact date. I made thirty-five of forty purchases. I knew what denatured alcohol was.

Mr. Pilliod: I have no further cross-examination.

[fol. 173] Thereupon the government, to maintain the issues on its part, called as a witness in rebuttal JACK DAVIS, who, being previously sworn, testified as follows:

Direct examination.

By Mr. Evans:

My name is Jack Davis. I testified yesterday in this case. I testified that I purchased completely denatured alcohol at Selzman's drug store one time. I think I stated from whom I purchased it. I did not know his name when I made the purchase.

Q. Do you see him now in the court room?

Mr. Pilliod: Objection. It is a reidentification here.

Mr. Evans: I would like to ask him the specific question.

The Court: He made the identification yesterday.

(Narrative:) I did not at the time I made the purchase tell the man who sold it to me that I intended to use it for cleaning purposes. The man who sold it did not ask me what I intended to use it for. He did not ask me any questions.

Mr. Evans. That is all.

Mr. Pilliod: That is all.

Mr. Evans: The government rests, Your Honor.

The Court: Are you able to say whether the defense will have any further testimony.

Mr. Breitenstein: I believe we will have a witness or two whose testimony will not require more than fifteen or twenty minutes, Your Honor.

The Court: Ladies and Gentlemen of the Jury, I am charging you to be very careful and not to make up your minds on the facts. I am going to ask you to be here Tuesday morning at nine-thirty. Please pay no attention at all if you see anything in the newspapers about this case. Whatever they have written in the case ought not [fol. 174] to be considered by you at all. They write from a standpoint of interest to their readers. It would be very pernicious in the administration of justice if the jury should pay any attention to those writings; and, of course, you will not. And be sure not to comment upon this case with any one else. The jury is excused until nine-thirty next Tuesday.

Adjourned.

The Court. The case is with the defense; do you have any further testimony?

Mr. Binzer: I have a couple of character witnesses I would like to put on. It will not take very long, though.

The Court: Put them on.

Thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf HENRY ROSEN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is Henry Rosen. I live at 2119 Franklin Street, Toledo. I have known the defendant Bracker for ten years. I have the means of knowing his reputation and character in the community. It is good.

The Court: This should be confined to reputation, not to character.

A. His reputation is good.

Q. Are you in business, Mr. Rosen?

A. Yes, sir, manufacturing.

Mr. Binzer: That is all.

Cross-examination.

By Mr. Evans:

I have known Bracker about ten years. I am in the Utility Tool Die and Stamping Company, manufacturers. Bracker was never [fol. 175] employed by us, but his father was. I base my opinion upon the fact that I generally called at their home and observed the family at the home. My opinion is based entirely upon my observation of Bracker and of his family at their home when I visited there.

Mr. Evans: I move that this testimony be excluded, Your Honor.

The Court: Have you associated with friends of his, Mr. Rosen?

A. I have associated with his family, with his father.

The Court: Do you know the same people that he knows?

A. Not all of the people.

The Court: Do you know some of the people that he knows?

A. Yes, sir.

The Court: What I want to know is whether you are in a position so that you can say, not what your own personal opinion is, but what the opinion of people who know him is?

A. I do.

The Court: That is qualification.

Mr. Evans: Outside of his family?

The Court: Do you know what people, other than his family, think of him?

A. Absolutely, yes, sir.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf AARON DAVIS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is Aaron Davis. I live at 2455 Franklin Avenue, Toledo. I know the defendant Martin Bracker. I used to live on Fourteenth Street. I moved away last year. They used to live across the street. I think that was for about seven years. I have known him seven years. He always used to come over with my boys on my porch and sit there for two or three hours. They were always together, I know.

[fol. 176] Q. I will ask you whether or not you have the means of knowing his reputation in your neighborhood and the community in which he lived?

A. I always found out he was a nice boy.

The Court: Because he associated with your people, did you make inquiries?

A. Yes, sir.

The Court: And the result of them was an opinion you have that his reputation was good?

A. Yes, sir.

(Narrative:) I know some of the people that Bracker knows. From discussion with other people about Bracker, I always thought his reputation very good. They used to live around the corner.

Mr. Binzer: That is all.

Mr. Binzer: That is all we have now. We have one more witness who will be here later.

The Court: There is no reason why you should multiply this.

The Court: Anything more for the defendant Selzman?

Mr. Breitenstein: Yes, Your Honor.

The Court: Put it on.

REBUTTAL

Thereupon the defendants, to maintain the issues on their part, called as a witness in rebuttal MEYER SELZMAN, who, being previously sworn, testified as follows:

Direct examination.

By Mr. Breitenstein:

Q. Your name is Meyer Selzman, and you were the proprietor of this drug store on Canton Avenue?

Mr. Evans: Just a minute please. If Your Honor please, I would like to inquire if this is re-direct, rebuttal, or just what it is.

[fol. 177] Mr. Breitenstein: This is rebuttal of the testimony of Bracker.

Q. Mr. Selzman, you heard the testimony of Bracker on cross-examination, did you not?

A. Yes, sir.

Q. This question was asked by Mr. Evans of Mr. Bracker: I will ask you whether or not anything caused you to change your practice, along in February, with respect to putting labels on bottles of completely denatured alcohol that you sold? The answer of Bracker was this: Selzman, my employer, instructed me that I should not put any more labels on bottles of completely denatured alcohol. I will ask you whether or not, during February you caused Bracker to change any practice in your store with reference to putting on labels on bottles of completely denatured alcohol?

A. No sir.

Q. Did you have any conversation with him on that subject?

A. No sir.

Q. This question was asked immediately thereafter: What caused you, if anything, to change your practice of asking people for what use they intended this completely denatured alcohol? The answer: It was because of the same instructions at the same time. I will ask you whether or not, in view of that question and answer, you gave Mr. Bracker any instructions relative to asking people who came in to purchase completely denatured alcohol as to what use they expected to put the completely denatured alcohol?

A. No instructions whatever were given.

Q. Did you have any conversation with him about that time relative to changing any practice?

A. No sir.

Q. This question was asked: Do you know whether or not Selzman gave Harry Porter any instructions about putting on labels? Yes I do, was the answer. The question was: How do you know it? [fol. 178] The answer: It happened to be on one occasion, the first time Harry Porter started working there. From his appearance, he looked like a nice chap. I suggested to Selzman, in some way, about not allowing the young fellow to mingle with that crowd, the shabby looking bunch. He said, that is all right, he knows all about it. I explained to him about not putting the labels on. Did you have such a conversation with Bracker relative to the placing of labels on bottles, and instructions which you gave to Porter on that subject?

A. No sir.

Q. And this conversation that was said by Bracker occurred a few days after Harry Porter started to work there; did you have any conversation along that line with Harry Porter a few days after he started to work at your place?

A. No sir, I did not, on the subject.

Q. These questions were asked of Bracker: I will ask you if, in the latter part of March, you had some conversation with Selzman about selling denatured alcohol without labels? The answer: Yes sir. The question: Where was that conversation held? Answer: Right in the store, when there were no customers in the store. Question: Who were present? Answer: Just Selzman and myself. I

will ask you whether or not you had any conversation of that kind with Bracker in March on that subject?

A. No sir, I did not.

Q. This question was asked:

State in substance that conversation?

Answer. I asked him how come he instructed me not to put any labels on. He said he did not want to have, in case some fellows got pinched, or something like that, to have them find a bottle with his label on. At the same time, he suggested that I mind my own business. I was getting my wages, and I would not be responsible for anything.

I will ask you whether or not you had such conversation with Bracker, or used any language of that kind?

[fol. 179] A. No sir, I did not.

Q. This question was asked Bracker:

Did Selzman, in his instructions to you, say anything about people, customers, or rather, prospective purchasers of this denatured alcohol being well dressed or poorly dressed?

Answer. Yes sir.

Did you have any conversation with him on that subject?

A. No sir, I did not.

Q. —

Question. What did he say to you about that?

Answer. He said, of course there are exceptions; if a woman or some other person comes in that looks respectable and so on, you better see that you get their name and put it down in the book, etc.

Did you have any conversation with Bracker on that subject and use any language like that, or have any discussion with him on that subject?

A. No sir.

Q. I hand you what is designated Government Exhibit 6, and ask you to look at pages one, and the back of page one; I will ask you whether or not the handwriting in there is your handwriting?

A. No sir.

Q. Is any of the handwriting on page one yours?

A. No sir.

Q. Is any of the handwriting on page two yours?

A. No sir.

Mr. Breitenstein: You may inquire.

Cross-examination.

By Mr. Binzer:

I would not say that I gave Bracker any kind of instructions relative to the sales of different things in the store. I cannot recall having any conversations of the kind. I knew Bracker was not a

registered pharmacist. I do not know that I had any conversation with him about it. It was my understanding that he was not registered. He had been working for Greenbaum for a long time before I got him, and from what I understood, he knew all about instructions relative to the sale of anything in the store.

[fol. 180] Mr. Binzer: That is all.

Cross-examination.

By Mr. Evans:

Absolutely all of these conversations that Bracker testified to are fabrications. I never had any such conversations of the kind. I did not tell him I had given instructions to the Porter boy.

Q. And he did not say to you that he thought, substantially this: That you ought to be careful. This Porter boy was a young lad and he thought you ought not to let him get mixed up with these shabby bums?

A. Nothing like that was ever said.

Q. Nothing like that?

A. No sir.

(Narrative:) I cannot recall having said anything to him at any time about putting labels on or leaving them off. I owned this drug store.

Q. And you bought the completely denatured alcohol that was sold and put out in that store, did you not?

Mr. Breitenstein: Objection. I did not touch upon that question in my examination.

The Court: Are you talking about Bracker or Porter?

Mr. Evans: Bracker.

The Court: This is clearly cognate——

Mr. Breitenstein: It makes no difference. I merely wanted to say that I did not touch upon this question in my examination—anything about the purchase of denatured alcohol.

The Court: I understand that. Let me explain why this is proper cross-examination within the limiting rule. You put this witness on the stand to deny that certain instructions were given respecting the sale of this commodity, a commodity the sale of which is safeguarded by certain restrictions and laws. He denies that he gave any instructions of any kind whatever. Why is not the government entitled to bring out the fact that, while he provided by his purchase [fol. 181] for a stock of this commodity in his store, he failed to see to it that his employees safeguarded the disposition of it.

Mr. Breitenstein: In the first place, Bracker worked in drug stores long before he did in this store. It was a general practice.

The Court: The only question the government is seeking to raise is a question which may or may not, as the jury weighs it, affect the integrity of his answer.

Mr. Breitenstein: It is not relevant or material.
The Court: He may have this question. Go on.

Exception.

(Narrative:) I am a registered pharmacist and I know that completely denatured alcohol is poison.

Mr. Evans: That is all.
The Court: Is there anything more, any further testimony.
Mr. Binzer: I have one more witness, Your Honor.
The Court: I do not want this see-sawing back and forth. Are you through with Selzman's part of the case?
Mr. Breitenstein: No, Your Honor, there is one more.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf HARRY SHANEMAN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pilliod:

My name is Harry Shaneman. I live at 1058 Parkside, Cleveland, Ohio. I have been acquainted with Mr. Selzman close to eight years. I have the means of knowing what his reputation is for good moral character in the community where he resides. It is good.

[fol. 182] Cross-examination.

By Mr. Evans:

My name is Harry Shaneman. I am the owner of a department store in Cleveland, Ohio. The store is at 4957 Woodland Avenue. I have known Selzman close to eight years. I have not known him intimately. I knew him as he came into my place of business and he is in the vicinity of my place of business. The people that he has worked for have always spoken very highly of him. This has occurred during the last five or six years. During the war period, he used to come into my store quite often and help me out in different things—sorting cards for the registration and things like that. The people I have talked with have said good things about him. I don't know a thing about Meyer Selzman selling wood alcohol.

Mr. Pilliod: Objection.
The Court: Yes, he knows nothing about this. He could not know anything about it.

Thereupon the defendants, to maintain the issues on their part, called as a witness in their behalf ISADORE FINK, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Binzer:

My name is Isadore Fink. I live at 2026 Vermont Avenue, Toledo. I have known Martin Bracker a number of years. I think about ten or twelve years. I have the means of knowing his reputation in the community. He has a good reputation. I am in the real estate business.

Mr. Binzer: That is all.
Mr. Evans: Nothing.
Mr. Binzer: We rest, Your Honor.
The Court: Very well. About the Selzman defense?
Mr. Pilliod: We rest, Your Honor.
[fol. 183] The Court: Has the government anything further?
Mr. Evans: Nothing, Your Honor.
The Court: Upon behalf of the defense of Selzman forty minutes are allowed for the argument to the jury; upon behalf of the defense of Bracker, fifteen minutes are allowed for argument to the jury.
Mr. Pilliod: The defendant Selzman moves the court to direct the jury to return a verdict of not guilty upon the same grounds which were set forth at the close of the government's case; that the evidence is insufficient to sustain a verdict.
The Court: The motion is overruled.
Mr. Pilliod: As to both indictments and all counts?
The Court: Yes. You may see that the record is complete in that respect.
Mr. Pilliod: And now as to the testimony of the defendant Porter. The defendant Porter pleads guilty in open court. We wish to make a motion at this time to strike his testimony from the record, and the jury be instructed to disregard it, in view of the fact that he is no longer in the case.
The Court: The court will not do that, but it will do this: the confession or statement which Porter made to the police, which is now in this record, is withdrawn and taken out of this case altogether, because Porter is no longer a defendant. But as to what Porter said happened down there; what instructions he received; how this business was conducted; that stays in this case. It would not make any difference whether he were a defendant or a private citizen; the testimony meets the issue here, and it should stay.

Exception.

Mr. Breitenstein: I presume Your Honor will inform the jury that not only was the conspiracy count dismissed against Porter, but later on the other counts, which he entered pleas of guilty on were dismissed also against Porter, and his pleas withdrawn; that there

is no charge against him now; and that no sentence has been imposed upon him.

[fol. 184] The Court: What business is that of the jury's? It is purely the court's business. If the court sees fit to take steps to the end that an infant shall not carry the burden of a criminal prosecution, what business is it of anybody else?

Mr. Breitenstein: Well, as to the modification of his testimony, as to the reason for the testimony, the reasons why he may have gone on the witness stand.

The Court: I am perfectly willing to tell this jury all about Porter's case from beginning to end as to just how these things came about. I shall not do so unless you request it.

Mr. Breitentsein: There may have been some inducements, promises, held out tactitly or impliedly—not by the court. Many times those things are inferred when the government asks a man to go on the witness stand. I think the jury and the defendant are entitled to have the jury know just what happened to Porter; that is all.

The Court: Just what did happen to Porter will be given to the jury at your request; but that will mean just what transpired here in the court room.

Mr. Breitenstein: Your Honor cannot know what reasons may have been in his mind, the mind of his family or friends, which may have induced him to go on the witness stand. All we have now is the bare fact that Porter has no charge pending against him now, and that the plea which he heretofore entered as to the sales counts was withdrawn, and they are dismissed——

The Court: Were you in court when that was done?

Mr. Breitenstein: Yes, Your Honor.

The Court: You know why they were withdrawn?

Mr. Breitenstein: I agree with the purpose for which they were withdrawn.

The Court: Do you object to the court's telling the jury why they were withdrawn?

Mr. Breitenstein: The motion was made at your request. The boy did testify. Nothing will occur to him. I think that the jury [fol. 185] should know, that after he testified, those things were done. I do not claim anything improper was done, and, of course, Your Honor knows that there is no such thought in my mind; but I think, just merely that fact that the Porter boy is free—will have no blight upon his career—and I heartily agree that it should have been done—but I think the jury ought to know about it.

The Court: Ladies and Gentlemen of the Jury, at the request of Selzman, through his counsel, and only because that request was made to the court, I want to explain to you the disposition of the case here attempted by the government against the defendant Porter. In the charge in this case, the court will take occasion to say to you that you are the sole judges of the credibility of witnesses who testify; and also the court will say to you something on the subject of the decree of care and caution with which you should approach the consideration of an accomplice witness in this situation, when the time comes to give it, which applies to the testimony of Porter. And it

doubtless will be suggested to you also that any one who is testifying in a way which tends to incriminate others, or who appears to stand in the light, coming from the government, of some favor, immunity, or lightly considered punishment for his participation in the crime, should have his testimony scrutinized pretty carefully in the light of the inferences which may arise out of that situation.

At this time we are asked by the defendant Selzman to tell you how Porter's case was disposed of. And we tell you only because we are so requested. It developed here that Porter was a mere lad, a boy still in the formative period of his life, and, in the eyes of the law, an infant. His charge is in its possibilities a serious one. The government saw fit to dismiss him, or asked the court to dismiss him, and that was done in your present, from the most serious charge, the conspiracy charge. That was consented to by us, not because the evi-[fol. 186] dence in this case did not tend to convict Porter of conspiracy. There was no attempt to say there was no evidence here against him. The government did not take that position, nor did the court take that view of it in dismissing him.

There were other reasons why that was done, which doubtless will occur to you as mature people. After the whole case was in from the government's standpoint, Bracker's testimony was heard, and the picture was completely before this court of, so far as we can understand, what went on in this store affecting Porter's actions, and we were able to see his environment. In your absence, the government came to the court and suggested that considerations of convenience and just common, every-day, kindly consideration of this boy required that the court close the case against him by imposing a sentence upon him on the counts to which he did plead guilty. He pled guilty to three counts of the sale of this intoxicant this denatured alcohol, and in your absence the boy was brought before the court for sentence. You have seen him, heard him testify, and perhaps you can appreciate,—I have no doubt that you can,—what that means to a judge on the bench who, sometimes at least, if not always, has some kindly considerations in his heart.

Frankly looking this case all over, the court felt like going even farther than the district attorney had suggested. We could see no good public reason why this young boy, under the circumstances, whatever might be your conclusion as to what happened there, however the principals in this case should come out as a result of this investigation, why this boy should carry through life the stigma of conviction of a crime of this character.

So it was the court's personal suggestion, without request, suggestion or hint from anybody, that the boy be not held at all.

[fol. 187] The other young lad was dismissed out of the case. He was a clerk there, but he had not been participating directly in this thing.

The court said to Porter,—and doubtless this was a surprise to the representatives of the government,—I know we had no consultation upon the subject,—we said we did not feel like imposing any sentence upon him; although we were compelled to because of his plea of guilty in these three cases. We said further that if he desired

to, and did, make the request, we would allow him to withdraw his plea of guilty to these three charges; and then, if he should withdraw, we would entertain a motion to dismiss the whole case against him.

Then an individual connected with this case, whose name I have no right to use at this time, did himself credit. After Porter said he would like to withdraw his plea of guilty, and the court granted it, this man did the very creditable thing of asking permission to make the motion that the court accept the withdrawal, and that was done. The court did accept the withdrawal under those circumstances. Then the government, to its credit, having regard to this boy, his age, his apparent candor, his general appearance as you and I saw him, and having regard to all of the facts and circumtsances so far as we can understand them, did request the court to dismiss the whole case against Porter. It was dismissed, and, in company with his father, he went back to his home.

It may be, and it is not at all unlikely that it will be, an element in this case for you to consider, when you come to appraise the quality of Porter's testimony, that this young boy hoped he would be treated favorably; and it may be that that hope, that expectation, was in his mind when he testified. He got this favorable consideration under these circumstances. You would not do yourselves credit here if you did not consider, in debating upon how far you repose faith and credit in his testimony, whether or not the hope that he [fol. 188] would be treated favorably might have colored or affected his testimony. It came about in this way.

This is not equivalent to a finding by anybody that Porter was not guilty, and that he should not have been indicted. In its final result, it amounts to simply a suggestion by the government of the United States, encouraged, of course, by the court, that it is unwilling to prosecute Porter, which is a long way from an acquittal on the facts and under the law. If, in your examination of this case, it should be your judgment beyond a reasonable doubt that any one is guilty of any of the offenses set out in either of these indictments, if that should be your judgment, the court has no hesitancy in saying to you that, on the state of facts, and on only a state of facts which would justify that judgment, Porter himself would have been guilty technically. It was only a question of what was the decent, right thing to do with this particular boy.

The Court: Anything more?

Mr. Breitenstein: In view of the court's remarks, which might possibly be considered in one respect, I would ask the court to instruct the jury at this time that, if they have inferred that the court has any judgment about the evidence in this matter, and the effect of certain evidence, they are not to regard that as binding upon themselves; but they themselves are to find what the facts are, and are not to regard any judgment they may infer that the court has with regard to the case.

The Court: That is proper for the court to say some time during the progress of this case. I do not know what inferences anybody possibly could draw from what the court said which would be unfavorable to any of the defendants in this case; but this jury will be

instructed very clearly when the time comes,—we might allude to it now,—that nothing that this court may say which may have a tendency to advise the jury of the court's view of the merits of the case, [fol. 189] should be accepted by the jury as having any control over its own judgment of the facts. It should be disregarded utterly; and if there is anything which the court has said in this particular discussion which seems to the jury to bear that interpretation, you will, of course, disregard it. You are the sole judges of the facts. The court has no business to attempt to control your judgment of the facts, nor should it permit you to go into a consideration of this case under any impression that the court has a judgment of the facts.

The Court: Anything more?

Mr. Evans: In the indictment 4206, court 4, the government moves that this count in this indictment be dismissed.

The Court: What does that refer to?

Mr. Evans: A sale to James Ryan by Selzman, Bracker and Porter; and the reason, Your Honor, is this: there is a variance here, apparently. The indictment says the first day of April, 1923, which is a typographical error.

The Court: All right. That may go out. Count 4 of the second indictment goes out. It is a typographical error in date.

The foregoing and the exhibits attached hereto and made part hereof, constitute all of the evidence offered and received at the trial of this cause.

Thereupon, after argument by counsel for the respective parties, the Court gave the following charge to the jury:

[fol. 190] CHARGE OF THE COURT

Ladies and Gentlemen of the Jury, the prosecutions in this case are based upon certain sections of an act of Congress commonly known as the National Prohibition Act, and regulations of the Internal Revenue Bureau which have the force of law because of the provisions of that Act. To be sure, the more important counts of these indictments do not charge a transgression of the National Prohibition Act at all, for they are charges of conspiracy; but the alleged object of the conspiracy is set out, in each instance to violate sections of the National Prohibition Act. You would not understand the applicable law in this case, so far as the statutes are concerned, respecting any of the counts, unless we went to the statute books and produced this Act in its pertinent parts.

The Constitutional Amendment forbids the sale of intoxicating liquor for beverage purposes. It directs Congress to pass laws appropriate to the execution of this constitutional mandate. Among other statutes, Congress passed Section 4 of the National Prohibition Act, Second Title, and passed also Section 13 of the Third Title of the Act. Section 4 provides that non-beverage liquids having an alcoholic content exceeding the limitation of one-half of one per cent shall not be subject to any provisions of the Act in question, except under certain circumstances; and it is the theory of the govern-

ment that the facts in this case exist in such a character as to bring this exception into play. The fact is that, if the government's charge is true, in any of these particulars, this exception does come into operation.

Section 4 says that the articles enumerated in this Section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act, if they correspond with the following descriptions and limitations, namely, "Denatured alcohol or denatured rum produced and used as provided by laws and reg- [fol. 191] ulations now or hereafter in force;" that is, the use, sale, barter and manufacture of denatured alcohol, if it is used in the sale or manufacture according to law, shall not bring the party handling it within the purview of the Act. The necessary inference is that, if it is handled contrary to law, the Act shall apply. And that is not mere inference, for the same section proceeds further to say: "Any person who shall knowingly sell any article mentioned in paragraphs A, B, C, D, E, F, (paragraph A, being the denatured alcohol paragraph), or who shall sell any of the same, under circumstances from which the seller might reasonably deduct the intention of the purchaser to use them for such purposes, shall be subject to the penalties provided in Section 29 of this Act." So that, under the law, the man who knowingly sells denatured alcohol for beverage purposes, or the man who sells denatured alcohol under circumstances from which it may reasonably be deduced, and from which he reasonably should deduce, that the purchase was for beverage purposes, is guilty of selling intoxicating liquor, as any other intoxicating liquors, and is to be punished accordingly.

Section 13 of the Third Title of the Act directs the Commissioner of Internal Revenue, from time to time, to issue regulations respecting, among other things, the sale of industrial alcohol,—denatured alcohol being industrial alcohol,—and to issue such regulations as may be necessary, advisable or proper, among other things, to prevent the diversion of the alcohol to illegal uses. By many considerations had by the courts, it is held that regulations drawn under such circumstances by Congress to an executive officer, as here, have themselves the force of law, and any violation of the regulations, consciously indulged in, becomes an offense against the United States.

The Commissioner of Internal Revenue, therefore, acting under this instruction, directed that the retailing of denatured alcohol [fol. 192] should be accompanied every time by a label on the package, printed in red ink on white paper, containing words "completely denatured alcohol," and the word "poison," and the statement: "Completely denatured alcohol is a violent poison. It cannot be applied externally to human or animal tissues without serious injurious results. It cannot be applied internally without inducing blindness and general physical decay, ultimately resulting in death."

There are two indictments here which have been consolidated, so that you are trying two cases. The first indictment contains but one count submitted to you; the second count is withdrawn. That count charges the two defendants remaining on trial with con-

spiring to commit an offense against the United States, in that they would sell denatured alcohol in this small-package, retail way, without affixing to the package the label which these lawfully directed regulations require; that they would sell this dangerous liquid, without the caution against its use which the wisdom of the executive officers of the government suggested should accompany a transaction. So, while the first count is not drawn under the National Prohibition Act, having been drawn under an old statute of the United States, the Conspiracy Statute, its validity in fact here against these defendants depends upon your applying this feature of the National Prohibition Act; for it is a fact that, if two or more persons agree to sell denatured alcohol in small quantities under five gallons, without affixing to the package containing the liquid this label, such an agreement, acted upon, becomes an offense against the United States, becomes a violation of the Conspiracy Act, because it is the crime of conspiracy to commit an offense against the United States.

The second case, 4206, contains six counts. The first and seventh counts are for conspiracy to commit an offense against the United States. The fourth count is withdrawn from your consideration altogether, because there was a misstriking of the typewriter, which [fol. 193] made the statement vary from the fact. The other four counts are individual counts for sales of denatured alcohol. All of these counts drawn to your attention, and to the Court's attention, the provisions of Section 4 of Title II of the Act. The first count charges the defendants with conspiring to sell denatured alcohol for beverage purposes. The second count charges the defendants with selling, on or about the 30th day of March, a half pint of denatured alcohol to Thomas Callahan under circumstances from which the defendants then and there might reasonably have deduced the intention of said purchaser to use this liquid for beverage purposes.

The third count charges the sale, on the first day of April, the next day, under the same circumstances, of a pint of denatured alcohol to Tommy Callahan.

The fifth count,—the fourth count is omitted,—charges the defendants with having sold, on the 30th day of March, at Toledo, a pint of denatured alcohol to Philip Thomas, under the same circumstances, circumstances from which they might reasonably have deduced the belief that Thomas intended to use this alcohol for beverage purposes.

The sixth count charges a sale to William Cronin, on the 30th day of March, of a quantity of denatured alcohol for beverage purposes, under circumstances from which they might have deduced the belief that the purchaser intended to use this alcohol for beverage purposes.

The seventh count is a conspiracy count; that these parties would sell unlawfully and knowingly denatured alcohol under circumstances from which they might reasonably deduce the belief that the purchasers of denatured alcohol intended to use the liquid for beverage purposes.

[fol. 194] Under the law of the United States, two men cannot be

convicted of mere conspiracy. They may enter into an illegal association to commit an offense against the United States, and no matter how definite that purpose is established in proof, they still cannot be convicted of any crime until it is shown also, with some decree of certainty, that in the pursuance of the illegal purpose, at least one step was taken calculated to carry that purpose into effect. The government is not required to prove that they actually accomplished that purpose in order to ask you to convict; but the government must prove that, having entertained the purpose, something was done, chargeable to all of them, to carry out, however unsuccessful; and the law requires the pleader representing the government to set up in the indictment a statement of at least one transaction having that office. This transaction is called the overt act.

In this case, on the conspiracy charge in the first indictment, the government pleads three overt acts. This first indictment charges them with conspiring to sell without a label, and as overt acts the charge is that these individuals, between the first day of March, and from that time until the second of April, sold without labels denatured alcohol to Philip Thomas, James Ryan, William Cronin, William Rickey, James Carter, Jack Davis, and to divers other persons.

As a second overt act, it is alleged that on the first day of April, for the purpose of consummating this alleged conspiracy, they sold James Ryan a half pint bottle of completely denatured alcohol.

And as a third overt act: that between the first day of March, and the first day of April, the defendant Selzman instructed his employees, including Bracker, to sell, and offer for sale, completely denatured alcohol without the label on the package,—to sell in the minimum quantities.

[fol. 195] You will observe that this case, 4172, does not require a consideration by you whether or not the seller knew, or had reason to know, that the purchaser bought it for beverage purposes. That element or ingredient is not in 4172 at all. The only question for you to decide is whether, in agreement with each other, the two defendants on trial entertained a mutual understanding to sell denatured alcohol in packages of less than five wine gallons, in any one of the three instances put out as overt acts in this case, intentionally omitting to label the package. Whether it was for cleaning purposes or radiator purposes, makes no difference. Did they consciously and collusively omit the observance of this regulation?

In the second case, 4206, each of the two conspiracy counts, the first and seventh, allege four overt acts, acts of sale. There it would be incumbent upon the government to show that, at least in one instance of those four, the sale was made as the fruit of a conspiracy so to do affecting the two defendants on trial under the first count, with knowledge that the party was intending to use it for beverage purposes. And under the seventh count, which would be the second conspiracy count of that indictment, that the sale was made under circumstances from which the seller might reasonably deduce the opinion and belief that the purchaser intended to use it for beverage purposes.

Just a word or two as to what conspiracy is, how a conspiracy may be established, and who are parties to a conspiracy. Commonly, we say that a conspiracy is an unlawful agreement to commit an offense, the parties to the crime having knowledge that what they agree to do will be an offense. While we use the word agreement, while that word ordinarily connotes to us something definite, something that may be outlined, having definition; it is, in fact, not required to be proved that the parties actually came together, one making the def-[fol. 196]inite proposition to the other, and the other saying definitely, "Yes, I will go with you on the proposition." As a matter of fact, the government is not required to produce that kind of proof. All the government needs to do, and practically all it can do in most instances, to prove the existence of conspiracy, is to show a set of circumstances affecting the parties charged with having entertained this unlawful agreement, from which the only fairly reasonable inference is that their minds were working together to a common end. When you see two men cooperating to produce a result, if you see that those men are apparently of average intelligence and comprehension, you right away assume that they are working together and know what they are doing, and that they are moved by a common impulse. That is the way you prove conspiracy. Co-conspirators, men who are alleged to be co-conspirators, are discovered to be such by consideration of what they are apparently doing together to help reach a common result. That is the line of proof the government has undertaken here.

Now who are co-conspirators? Not necessarily only those who stand on a common level, and who have a common interest; for it may be that a man may be a co-conspirator with another and not have any interest in the thing whatever. A man's relationship to a conspiracy is not measured by a consideration of what he is going to get out of it. It may mean nothing to him personally; but, nevertheless, if he knows what the unlawful project is in which his companion is interested, and, having knowledge, he goes to work and consciously helps his companion, and his companion accepts his assistance, he becomes a co-conspirator; and when the thing is attempted to be carried into operation, he becomes equally chargeable with the other. What would be the ultimate result, of course, of a conviction under such circumstances, is for some other body than a jury to determine. The jury simply determines the fact of the connection of the individual.

[fol. 197] It follows, therefore, from this, that an employee obeying the unlawful directions of his employer, and assisting by that obedience to carry out the unlawful purposes of his employer, becomes a co-conspirator with him, if the employee knows what he — doing. The only distinction to be made between the two, under those circumstances, is that distinction in punishment which any considerate court would make. So far as the jury, the sole judges of the facts of the case, is concerned, there is no distinction to be made: they are equally guilty.

In these sale counts, it is charged that Bracker, Selzman; and Liebenthal and Porter, the boys who have been dismissed altogether,

sold, under the circumstances set out in this second count. There is no evidence in this case that Liebenthal sold anything, that he saw anything sold, so his name may be dropped out of this consideration. There is testimony here by Porter that he made some sales, and he alleged that he sold on instructions of his employer, the defendant Selzman. There is testimony here by Bracker, the defendant, that he made sales and he makes the same explanation that Porter made. Other witnesses have testified not only to purchases from Porter and Bracker, but in one, possibly other, instances, directly from Selzman himself; but in each one of these counts, these men are coupled together.

That makes it necessary for you to consider the responsibility of a merchant, such as a druggist would be, for the acts of his employees. The law would make Selzman here responsible for every sale of nonbeverage alcohol, denatured alcohol, made in violation of law by one of his employees, if that sale, even though made in his absence and without his knowledge, was made by the employee following a course of business instructed to him by Selzman himself. That is to say, if it is a fact that Selzman instructed his employees to sell denatured alcohol, without a label, to these men whenever they applied for it; if it is true, as Porter and Bracker have testified, that [fol. 198] such course of business was instructed to them by Selzman, then every sale they made after that, either one of them, following that instruction, was Selzman's sale, just as concretely and directly as if Selzman were right there participating in it. Any illegal act performed by these employees, following the instruction of their employer, became the illegal act of the employer. It does not make any difference whether he knew it or not.

I have said to this jury that the first case, 4172, containing but the one conspiracy count, involves nothing less than a conspiracy to sell denatured alcohol in quantities of less than five wine gallons, without labeling the packages, followed by proof of at least one sale; and that the purpose for which the purchase was made by the purchaser has no office in that sort of case.

To convict these defendants of conspiracy on the second case, however, one of two things must appear; that the purpose was to sell when the seller had knowledge that the purchaser was buying for beverage purposes; or that the conspiracy was to sell in face of circumstances from which it might reasonably be inferred that the purchaser was going to buy for beverage purposes. In other words, these two conspiracy charges are drawn involving the element of guilty knowledge, either actual, which is the substance of the first characterization of the conspiracy; or constructive, which is the characterization of the second charge of conspiracy in the seventh count. So that these men cannot be convicted on either one of these conspiracy counts unless this guilty knowledge is found to be there beyond a reasonable doubt.

Congress, in drafting this statute, intended to meet conditions of cases in which one minded to violate the law might attempt to seek refuge in suberfuges and indirections, so it put in the alternative: sale with direct knowledge, or sale under circumstances from which

[fol. 199] knowledge might be imputed. I want to say to this jury that should you convict these men on the first and seventh counts of this indictment, and whether you should convict them on the first and seventh counts jointly on both counts, is solely for you to decide; but should you do so, the court would find itself unable to do anything more than impose one punishment. I think the government was wise in casting the charge *charge* in these two counts, but after all, proof that would satisfy one count will also satisfy the other, and, consequently, the two counts cover the same situation. It has always been the law,—Congress had that in mind undoubtedly in framing this legislation,—what whoever did a thing under circumstances that should reasonably have led him to believe a certain fact existed, did it consciously in face of that fact.

I, probably, have had occasion to speak in some other cases to some of these jurors,—I know I have had it during this term,—of what is proof of guilty knowledge. Proof of guilty knowledge may be direct. Some testimony which tends directly to bring knowledge home to the individual under examination; where you can see, without any process of reasoning at all, that he knew what he was doing. Guilty knowledge is also established by the presence of a set of circumstances in fact of which, proven to the jury's satisfaction, the man under consideration acted,—circumstances which are of such a character that the*y* jury is able to see that the man under consideration, reacting to those circumstances, must have had reason to believe that the fact they suggest existed. So if you should see here that the circumstances under which this alcohol was sold to these men who appeared on the stand, coupled with the testimony of Bracker and Porter as to what their employer said they should do under such circumstances by way of avoiding inquiry, or failing to label; and coupled also, if you find the fact existed, as to what Selzman said to the officers when he was inquired of as to this matter,—[fol. 200] I am alluding, among other things, to the undertaker inquiry,—if putting all of these things together in their proper relationship to one another; and you find yourselves satisfied beyond a reasonable doubt in the conclusion that Porter and Bracker, acting under Selzman's instructions, sold this alcohol in any one of these instances under circumstances which should have advised them that they were selling for beverage purposes, thus making a case complete; if you find that the alleged conspiracy existed under the seventh count of this indictment, that very proof would meet the requirements of overt act proof of the first count of the first indictment. It would be a sale with guilty knowledge.

Please bear in mind that the sale counts of this second indictment, the second, third, fifth and sixth counts, do not involve sales with guilty knowledge at all. They are like the overt acts of the conspiracy count of the first case; they charge sales merely in violation of the labeling provision.

Ladies and Gentlemen of the Jury, you cannot find either one of these defendants guilty of a conspiracy without finding that he acted with some one. While Bracker and Selzman are the only one on trial, they are not the only ones shown in this testimony to have

been active in these transactions. The testimony shows also that Harry Porter was active; and if you find that Selzman conspired with Harry Porter, and did not conspire with Bracker in any one of the particulars mentioned here, and these overt acts were the fruits of such conspiracy in any case, it is not impossible that you should convict Selzman, if that be your conclusion beyond a reasonable doubt, and acquit Bracker, notwithstanding the fact that Porter is clear out of this case. Porter's innocence has not been established; [fol. 201] neither has his guilt. The government has merely dismissed the charges against that boy. He has not been acquitted. The evidence here tends to show him guilty. Whether it should show him guilty or not is not for this court to say.

The evidence here tends to show Bracker and Selzman guilty as to each one of the counts before this jury. Whether that tendency is strong enough to require a verdict against these men at your hands is not for this court to say. We only say to you that if you believe this testimony in substance, you would be justified in finding the verdicts demanded by the government; but it is for you to measure the weight of this evidence, for you to pass upon the facts. No other agency can do that for you, or help you to do it, by advising you what to do. No other agency has that power. You have nothing to do with the judgment that is to be meted out, if your judgment is that the verdict should be guilty as to these two men. That is not within your province at all; it should not be considered by you in any way. Whatever you should assume that the court might do to either one of these men, one thing or another, light or heavy, to indulge that assumption with any office in determining what the cold facts are, would be wrong. One of the gravest duties imposed upon the court is to make discriminations and to weigh considerations for or against the unfortunate individuals who come before the bar of the court for judgment. The jury cannot undertake that office for the court and ought not to attempt it.

You are, therefore, the sole judges of the facts of this case. You ought not to permit any impression you have, if you have any, as to the court's views of the guilt or innocence of either one of these defendants, to affect the making up of your opinion in any way whatever. You are the sole judges of the credibility of witnesses. Two witnesses in this case are in the classification known by the law as accomplice witnesses. I refer to Porter and Bracker. You may [fol. 202] convict on the testimony of accomplice witnesses, if that if your good judgment. The court is required to advise you, however, that is is dangerous to convict on the uncorroborated testimony of accomplice witnesses, because they admit to practices which are reprehended in the charge; they come to the witness stand tainted with the crime ascribed to them, and their testimony is not regarded as having issued in a clear stream. It is the duty of the court to advise you to go to the whole case to look for corroboration. Corroboration is something in the whole record from an acceptable source, some item, incident, line of testimony, which, in the wise judgment of the jury, has a tendency to make acceptable the testimony of an accomplice witness. It need not go to everything the accomplice witness

says; all it need to do is to be of sufficient weight, to go far enough to give a tinge of acceptability to the accomplice witness. Corroboration may exist in your wise judgment in the appearance of any of the men who appeared as patrons of this place. It may exist in your judgment in whatever interpretation you place on what is described as the utterances of the defendant Selzman to the officers when he was arrested. It may exist as you determine the strength of the inferences in the extent to which these transactions were carried on in this place, these alleged sales of unlabeled alcohol, some of them made in this peculiar, non-conversational way. Corroboration may exist in any of these instances, or other incidents on trial, which you find to be established beyond a reasonable doubt.

Bracker has testified in his own defense. He was not put on the stand as a government witness. It may be that he testified under the belief that perfect frankness on his part might induce some favorable consideration in case he was convicted. It is not unnatural that he should believe that. I would regret very much to have this court have the reputation of not giving that sort of attitude any consideration. It may be that he testified under the impression that [fol. 203] being but an employee, he might unload a good deal of the responsibility on his employer. It may be that he testified influenced by some feeling against his employer, a feeling to which he confesses. It may be that Porter testified as a witness for the government with the feeling that he would get some consideration, a consideration which he got. I do not know whether these things happened in any one of these instances. They are all possibilities, and, being possibilities, it is incumbent upon you to examine and determine whether these conditions, in any particular, existed, and to what extent, if at all, they existed to color the testimony of the witness in question. You weigh his credibility.

The other defendant, Selzman, testified in this case. He testified undoubtedly in the face of a very grave interest in the outcome of this case. You have a right to assume that he was conscious that he had a very vital interest in the outcome of this case. You heard his testimony. It is for you to determine how far, if at all, that interest affected his testimony. It is for you to determine to what extent you should believe him.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Anything for the government?

Mr. Evans: No, Your Honor.

The Court: When these men were arraigned, they pled not guilty. Immediately there arose in behalf of each one of them a presumption that he was indeed not guilty. It is the presumption of innocence, a very important feature. It is the touchstone of the weight of testimony, and in the light of this presumption, it is required that every reasonable doubt should be resolved in favor of the defendants, each of them; and because of it, it comes about that you cannot convict, on any one of these counts, either or both defendants, unless you are satisfied as to the count in question that

they are guilty beyond a reasonable doubt, that is, to a reasonable [fol. 204] certainty. Not beyond any doubt, not beyond the possibility of doubt, but beyond a reasonable doubt, a doubt that is characterized by that qualification that it is reasonable; a doubt that is reasonable because it is a logical product in your mind, the mind of any one of you, who entertains such a doubt, the logical product of a thoroughly careful and dispassionate attempt to reach a conclusion as to the facts. If that exists,—each juror is here as a member of a deliberative body to assist and to be assisted by any one else,—if such a doubt exists under these circumstances, he should adhere to it, and not allow himself to join in a verdict of guilty. If you do find these defendants, or either of them, guilty beyond a reasonable doubt, or to a reasonable certainty, then it is your duty to return a verdict, because you cannot then entertain a reasonable doubt.

The Court: Anything for the defense?

Mr. Breitenstein: There is one point in the charge: you said something about if they found the circumstances to the jury's satisfaction. I presume Your Honor meant by that that the circumstances also must be proven beyond a reasonable doubt, every circumstance. Also I want to ask the court to say that not only must the conspiracy itself, but every one of the overt acts alleged in there, must also be proven beyond a reasonable doubt. Another thought I had was that the men Thomas and Ryan, etc.; if they went in this store to purchase denatured alcohol for beverage purposes, they likewise became accomplices, and their testimony should be considered in the light of accomplice testimony, also.

The Court: When the court said to the jury that circumstances must be proved to the jury's satisfaction, we meant simply this: that those circumstances which are taken by the jury as the circumstances whose connection or relation with one another voices the ultimate fact—must be seen by the jury to have been established here be- [fol. 205] yond a reasonable doubt, to a reasonable certainty. No circumstance that you assume to exist by a preponderance of the evidence can possibly be used by you for any persuasive purposes whatever. The intermediate facts upon whose foundation the relationship and connection with one another is to be built, the ultimate fact, those intermediate facts, of course, must be established to a reasonable certainty, and they would not be established to the jury's satisfaction, as I used that term, unless they were established to a reasonable certainty.

It is not the law, as stated by Mr. Breitenstein, that each one of these overt acts alleged in the first indictment as having been entered into and to consumate the alleged conspiracy, must be proven. If the government has established any one of them beyond a reasonable doubt, that is enough.

There are four overt acts pleaded to each of the two conspiracy counts in the second case. If the government proves just one of them as a transaction had in furtherance of the alleged conspiracy, one of them in each instance, that is enough; no matter whether the government utterly fails to prove the others.

Mr. Breitenstein: On that point, Your Honor, I did not mean that every one be proved, but I wanted to have Your Honor tell the jury that an overt act stands upon the same plane, as far as the degree of proof is concerned, as the conspiracy itself, and an overt act must be found to be true beyond a reasonable doubt.

The Court: There is no question about that. The overt act must be established to a reasonable certainty, which would mean beyond a reasonable doubt.

The Court: Anything more?

Mr. Breitenstein: With regard to Philip Thomas and those men who came in there and purchased. I think the law to be that, as they had the intention in their mind to use it for beverage purposes, they are accomplices, and their testimony should be considered in that same light.

[fol. 206] The Court: I believe that is true. I want to emphasize this court's opinion. We have spoken from this bench a good many times on that subject, that the man who negotiates the illegal purchase of intoxicating liquor becomes himself a violator of the law, and is a co-conspirator with the man who sells it to him. I have not very much patience with some people who say they will buy it if they get a chance, because when they make that statement, they confess that they will consciously violate a law of the United States by inducing its infraction. I suppose, in a really fine analysis, Mr. Breitenstein's theory of the guilt of these four witnesses is correct, assuming that they did what they said they did. They would be technically co-conspirators. You are advised to look to the whole record for corrpboration.

The Court: Anything more?

Mr. Breitenstein: No, Your Honor.

Mr. Binzer: If Your Honor please, I wonder if it would be necessary to furnish two separate forms of verdict.

The Court: We have them separate; we have them already made. That has been done. The two forms, 4172, we thoughtlessly struck out part of the clerk's provision here for a verdict, and then, noting the error, we have corrected it by some writing of our own to make it plain to you. This blank gives you the opportunity to find one defendant guilty and one not guilty of conspiracy, provided you exonerate one of the defendants and convict the other defendant, on the theory that the necessary second co-conspirator was only Porter. If you find that Bracker and Selzman were co-conspirators under the conspiracy charge of number 4172, which involves the agreement to sell and the sale without labels, why then you will find, if that is your conclusion beyond a reasonable doubt, you will take this form and add the word guilty after the name of each one of the defendants, no matter what you may think about Porter being one of the co-conspirators. And if you find that neither one of these [fol. 207] defendants was a co-conspirator, you will, of course, put the words "not guilty" after each one of them.

The verdict blank in 4206 will be understood by you. The fourth count is eliminated, and all the provisions of that blank relating to

Porter are stricken out. As far as the conspiracy counts are concerned, which are the first and seventh, what I have said to you about the conspiracy count in the first case as to the power to distinguish between Bracker and Selzman as co-conspirators, with a view of coupling either one of them, in your judgment, with Porter, applies.

The sales counts are here applicable to each one of the defendants on trial.

Mr. Breitenstein: On the sales counts, one alone can be convicted.

The Court: Oh yes, one or the other may be convicted on the sales counts; or both, just as you weigh this evidence.

(Case went to jury.)

[fol. 208] COLLOQUY BETWEEN COURT AND JURY

(Jury returns for further instruction from the Court.)

The Court: The Court is informed, Ladies and Gentlemen of the Jury, that you request some advice of the Court respecting the first count.

Jury Foreman: The question arose about 4172; that comprised the conspiracy charge alone. And then in 4206, counts one and seven, we considered the conspiracy charge the same, and the others for selling unlawfully. On the question in 4172, there is a division.

The Court: What did you want from the Court?

Jury Foreman: Some did not understand. Some want to vote on this selling without a label. Most of them did not understand it that way. They understood it was practically a conspiracy charge.

The Court: If you just let me have it, I think I can make that clear.

The Court: There are two lines of offenses which might be committed when two or more persons undertake to deal with denatured alcohol in the way of selling it for beverage purposes. One of the offenses would be the selling it for beverage purposes. That offense would be complete whether the package were labeled or not, provided the individuals charged knew, or had reason to know from the circumstances, that the purchaser intended to buy it for beverage purposes. The other offense would be simply to sell it without putting a label on. That offense would be complete whether the individual who sold it knew it was to be used for beverage purposes or whether they had good reason to think it was to be sold for cleaning, radiator purposes, or what not. The law requires this label to be put on, and it is an offense against the United States not to put it on when denatured alcohol is sold in packages of less than five wine gallons. The purpose for which sold does not make any difference, the mere selling without a label is a violation of the law. So the government in this case has charged these people with agreeing to sell and then selling without a label, irrespective of the purchases. That is 4172.

[fol. 209] If the jury finds beyond a reasonable doubt that the de-

fendants on trial cooperated together as employer instructing the employee, and employee acting under his employer's instructions, to sell denatured alcohol in packages of less than five wine gallons, without a label, and that in one instance there was a sale without a label pursuant to such an agreement, then you have found all of the elements which would not only justify, but should require you to find a verdict of guilty under 4172.

In 4206, the grand jury went further yet. They charge that there was an additional conspiracy, a further conspiracy to sell for beverage purposes, and then drew the counts in that indictment on that subject. It would not make any difference, so far as the purpose for which the purchaser was getting it was concerned, whether the packages were labeled or not. If any one sells for beverage purpose-, and puts the label on, yet has reason to know it was used for beverage purposes, he violates the law, just as well as if he did not put the label on. The fact that the label was not put on, if that were a fact, would be only an incident, one of the circumstances which attended the transaction, which might or might not help the jury find out what the parties intended to do. If they purposely omitted the label when they had the purpose to sell for beverage purposes, the jury might find in that purposeful omission to label that something to advise the jury what their mind was as to what the article was to be used for.

That is all that has to do with the second case. The two matters are entirely distinct.

Does that meet your difficulty in any way? Is there anything else you would like to have from the Court?

Jury Foreman: That is satisfactory.

(Jury re-retires.)

[fol. 210] VERDICT

Thereupon the jury retired and thereafter returned into court with its verdict, which said verdict was in favor of the plaintiff and against the defendants, as appears of record herein.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

Thereupon the defendant Meyer Selzman moved the court to arrest judgment upon the ground that the verdict was inconsistent and repugnant, and for other reasons as appears in the written motion then and there filed by said defendant; which motion was overruled, to which action of the court the defendant Meyer Selzman duly excepted.

Thereupon the court entered judgment upon said verdict, as appears of record herein, to which action of the Court the defendant Meyer Selzman duly excepted.

ORDER OVERRULING MOTION FOR A NEW TRIAL

Thereupon and within three days after the rendition of said verdict and the entry of said judgment, the defendant Meyer Selzman filed his written motion for a new trial as appears of record herein, which motion was overruled by the court, to which action of the court the defendant Meyer Selzman duly excepted.

ORDER SETTING BILL OF EXCEPTIONS

Now comes the defendant Meyer Selzman and presents to the court his bill of exceptions, in narrative form, and asks that the same may be allowed; and the court, upon consideration thereof, finds the foregoing to be a true, correct and complete bill of exceptions, and the same is hereby allowed, signed and ordered to be filed as part of the record herein, this 13th day of January, 1925.

(Signed) John M. Killits, Judge.

[fol. 211] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—March 12th, 1925

For good cause shown to the Court, it is hereby ordered that the time for filing the transcript of record with the Clerk of the Supreme Court be and is hereby extended to the 15th day of March, 1925.

[fol. 212] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 11th, 1925

The Clerk of this Court is hereby dierected to prepare and certify a transcript of the record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

Caption,
Indictments—4172 & 4206,
Demurrers—4172 & 4206,
Orders Overruling Demurrers,
Journal Entries on Arraignment,
Order consolidating Cases for trial,
Journal Entries on the trial,
Verdict of the Jury,
Motion to arrest Judgment,
Sentence,
Order suspending sentence,
Motion for new trial,

Order overruling same,
Motion to Modify Sentence,
Court's memoranda opinions with reference to motions,
Petition for Writ of Error,
Assignment of errors,
Order allowing Writ of Error,
Order fixing cost bond on Writ of Error,
Cost Bond,
Write of Error,
Citation and proof of service thereof,
Bill of Exceptions in narrative form,
Order approving Bill of Exceptions,
Order extending time for filing Præcipe,
Præcipe for Transcript,
Certificate to Clerk,

and deliver all papers to the Clerk of the Supreme Court of the United States at Washington, D. C.

[fol. 213] Gerard J. Pilliod, Jos. C. Breitenstein, Ben F. Schwartz, Attorneys for Meyer Selzman.

[fol. 214] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

NORTHERN DISTRICT OF OHIO, ss:

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the final record, including the bill of exceptions in narrative form, petition for writ of error, assignments of errors, and bond on writ of error, and all proceedings in said cause in accordance with the præcipe or transcript filed by plaintiff in error, the originals of which are now in my custody as Clerk of said Court.

There is also annexed to and transmitted with such transcript of record, the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the Seal of said Court at Toledo in said District this 12 day of March, A. D. 1925, and in the 149th year of the Independence of the United States of America.

B. C. Miller, Clerk, by C. B. Watkins, Deputy Clerk. (Seal of the U. S. District Court, Southern District of Ohio.)

Endorsed on cover: File No. 30963. N. Ohio D. C. U. S. Term No. 998. Meyer Selzman, plaintiff in error, vs. The United States of America. Filed March 18th, 1925. File No. 30963.

MAR 20 1925
WM. R. STANSBURY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 998.

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

MOTION FOR SUPERSEDEAS AND BAIL AND BRIEF IN SUPPORT THEREOF, WITH NOTICE AND PROOF OF SERVICE.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 998.

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.
DEFENDANT IN ERROR.

NOTICE.

The defendant in error herein is hereby notified that the plaintiff in error will, on Monday, the 23d day of March, 1925, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion for an order directing that writ of error may be made a supersedeas, and that plaintiff in error be released on bail in the sum of $5,000.00 pending the final disposition of said writ of error,

to the Supreme Court of the United States in its court-room, at the Capitol, in the city of Washington, D. C.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the motion are hereby acknowledged.

JAMES M. BECK,
H.,
Solicitor General,
Attorney for the United States of America.

IN THE SUPREME COURT OF THE UNITED STATES.

MEYER SELZMAN, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA, *Defendant in Error.*

MOTION FOR AN ORDER DIRECTING THAT WRIT OF ERROR MAY BE MADE A SUPERSEDEAS AND THAT PLAINTIFF IN ERROR BE RELEASED ON BAIL IN THE SUM OF $5,000 PENDING THE FINAL DISPOSITION OF SAID WRIT OF ERROR.

Now comes Meyer Selzman, by Joseph C. Breitenstein and Gerard J. Pilliod, his counsel, and moves this honorable court for an order directing that the writ of error to the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, Ohio, pending in this honorable court under the provisions of Section 238 of the Judicial Code of the United States, may be made a supersedeas, and that plaintiff in error be released on bail in the sum of five thousand ($5,000.00) dollars pending the final disposition of said writ of error, it appearing in the transcript of the record and a memorandum opinion of Hon. John M. Killits, United States District Judge for the Northern District of Ohio, Western Division, attached hereto and made a part hereof, that the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, Ohio, has refused to admit convict to bail and upon supersedeas pending proceedings in error in this court.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Attorneys for Plaintiff in Error.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Criminal, Nos. 4172 and 4206.

THE UNITED STATES OF AMERICA, *Plaintiff*,

against

MEYER SELZMAN ET ALS., *Defendants*.

MEMORANDUM.

KILLITS, *J.*:

In passing on certain motions in these cases the court expressed its views there raised in a memorandum filed October 27, 1924. In the first case the defendant was sentenced to the penitentiary for violation of Section 37 of the Criminal Code, conspiracy; in the second case, he was sentenced to several terms, to be consecutively served in a workhouse, service to commence at the expiration of the penitentiary sentence imposed in cause 4172.

In the first case the alleged conspiracy consisted of an agreement to violate a regulation respecting the sale of denatured alcohol. In the second case, while raising the same question as to the jurisdiction of Congress to authorize regulations governing the sale of tax-paid alcohol for industrial purposes, the additional point is made, and overruled by the court, that Congress was without power to include in the National Prohibition Act a penalty for the sale of denatured alcohol for beverage purposes.

The cases were tried together. The evidence against the defendant was clear and conclusive, hardly open to dispute. Practically the only defense was the denial of the defendant of criminal intent, which was met by a superabundance of proof to the contrary. The defendant was promptly sentenced, but, on account of a domestic situation, execution of the sentence was suspended until the first of April by the consent of the United States, through the District Attorney, the convict being enlarged on bail to expire with March 31, 1925. We are now asked to admit convict to bail and upon supersedeas pending proceedings in error in the Supreme Court of the United States. This we have declined to do. As the court said in the opinion of October 27, the contentions to be submitted for review seem to be extremely fanciful. As to the first case, No. 4172, involving imprisonment in the penitentiary, we are unable to see any ground for argument at all. The second case involves some measure of construction of the National Prohibition Act. Whatever prospect of successful issue to the convict in the Supreme Court there is in the whole record seems to this court to abide in a consideration of the second case, 4206. Whatever relief convict will get from the judgment of this court will come in that case if at all. The term of imprisonment imposed in the first case affords ample time in its service for a presentation and a determination of the questions in the second case by the Supreme Court.

We therefore have declined to enlarge the convict pending proceedings in error.

JOHN M. KILLITS,
Judge.

JANUARY 19, 1925.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, B. C. Miller, clerk of the District Court of the United States within and for said district, do hereby certify the foregoing to be a true copy of the memorandum of court filed in the above-entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Witness my official signature and the seal of said court, at Toledo, in said district, this 23d day of January, A. D. 1925, and in the 149th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
Clerk,
By H. A. WATKINS,
Deputy Clerk.

ARGUMENT.

The issue referred to by the District Court at Toledo is, briefly, as follows:

The defendant was a registered pharmacist and was indicted and convicted under the provisions of Section 37, Criminal Code, for conspiracy to violate the provisions of certain regulations prescribed by the Commissioner of Internal Revenue and relating to the denaturation of alcohol, which provided in substance:

1. That alcohol might be denatured under Government supervision at the distillery and after payment of the tax.

2. That thereafter it might be sold at retail, tax free, provided a specified label was affixed.

It is contended that the taxing power of the Government, as created by statute, extended to the alcohol only until denatured; that after denaturation it went out into the country free from any Government supervision or authority; that the Commissioner no longer had power or control over it within the scope of the statute from which his pretended authority is claimed; that, therefore, the regulations had not the force and effect of law and no conspiracy to violate such provisions could be maintained.

It is not claimed that the authority of the Commissioner was derived from any of the provisions of the Volstead Act, and the regulations in question have no relation to that Act.

A statute exists in Ohio governing the sale of denatured alcohol at retail.

It was said by this court, in Hudson *vs.* Parker, 156 U. S., page 285:

> "Statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment or imprisonment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

It is not urged here that the defendant is entitled to bail as a matter of right after conviction. The tenor of the decision seems to be that the benefit of doubt should be given to the plaintiff in error with a view to avoiding every possibility of his suffering a period of imprisonment upon a conviction subsequently reversed. In accordance with this principle the discretion of the trial judge should be exercised with the greatest care.

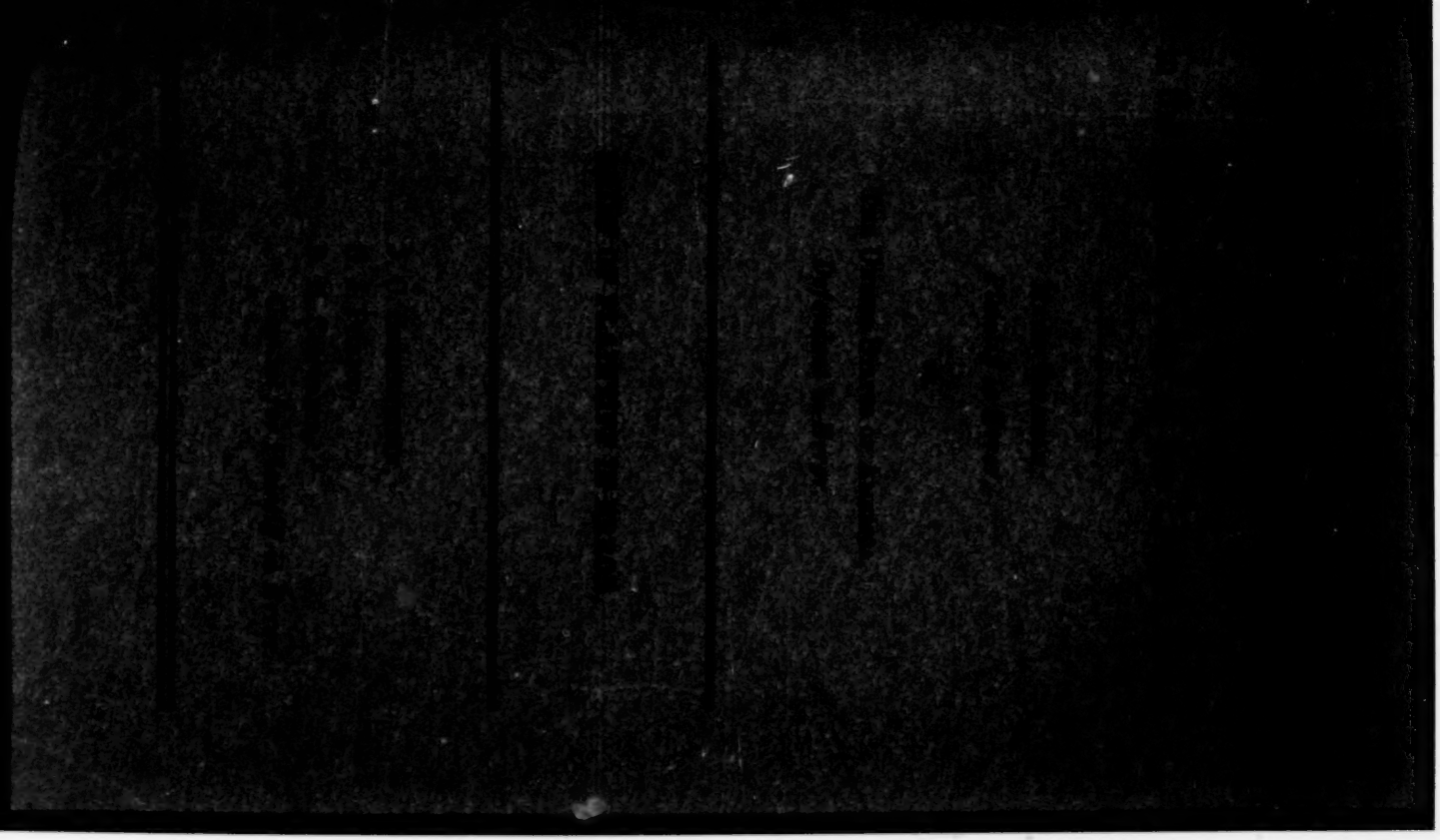
The plaintiff in error is a young man 25 years of age, with a wife and child dependent upon him for support.

The issues raised by the writ of error are neither frivolous nor fanciful, and there is enough prospect of success to warrant the temporary enlargement of plaintiff in error. Counsel ought to be permitted to say that they have been unofficially informed by a number of prominent pharmacists in the State of Ohio that a decision of this question would be welcome to the members of their profession.

Respectfully submitted,

J. C. BREITENSTEIN.
G. J. PILLIOD.

[Endorsed:] File No. 30,963. Supreme Court U. S. October Term, 1924. Term No. 998. Meyer Selzman, plaintiff in error, *vs.* The United States of America. Motion for supersedeas and bail, notice, and proof of service. Filed March 20, 1925.



In the Supreme Court of the United States

MEYER SELZMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FACTS.

The plaintiff in error was convicted of a series of violations of Section IV of the National Prohibition Act, and of Section 37 of the Criminal Code. He was sentenced upon each of these offenses, the terms to run consecutively.

The pertinent portion of Section IV reads as follows:

> "Any person who shall knowingly sell any of the articles mentioned in Paragraph 'a' 'b' 'c' and 'd' of this Section for beverage purposes * * * or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes * * * shall be subject to the penalties provided in Section 29 of this title."

The offenses charged were a series of unlawful sales of completely denatured alcohol, as defined in Paragraph "a" of Section IV, as follows:

> "Denatured alcohol, or denatured rum, produced and used as provided by laws and regulations, now or hereafter in force."

The offense referred to under Section 37, Criminal Code, is defined in Article 108 of Regulations 61, of the Commissioner of Internal Revenue, the pertinent section reading as follows:

> "Every package of completely denatured alcohol containing less than five wine gallons, sold or offered for sale by denaturers or dealers, must have affixed thereto a label on which must be printed in plain legible letters, red on white, the words, 'Completely denatured alcohol,' and, in addition on the same label, there shall be printed in large letters, in red ink, under the skull and bone symbol, the word 'poison,' together with the following statement: 'Completely denatured alcohol is a violent poison; it cannot be applied externally to human or animal tissues, without serious injurious results; it cannot be taken internally without inducing blindness and general physical decay, ultimately resulting in death.' * * * No other extraneous matter will be permitted thereon without the express authority of the Commissioner of Internal Revenue."

The contentions are made, first—That the provisions of Section IV as quoted are not properly within the purview of the Eighteenth Amendment, and are inconsistent with and repugnant to the provisions of the Volstead Act defining intoxicating liquor, because completely denatured alcohol is not a beverage, being, from its poisonous nature, unfit for beverage purposes.

Second—That Section 108 of Regulations 61 is not lawfully made within the statutory authority of the Commissioner, and that such section constitutes, not merely an administrative provision, but is, in effect, additional legislation by the Commissioner.

The questions were raised by demurrer and by motion to arrest judgment, as appears in the Record.

ARGUMENT.

I.

The Eighteenth Amendment provides in Section I:

"After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States, and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

In Section II:

"The Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation."

The Volstead Act, Section I, provides:

"When used in Title II and Title III of this Act, the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes."

Congress derived its power to legislate on the subject of intoxicating liquor from the Amendment, but the term "intoxicating liquor," not safely left to judicial interpretation, presented a problem of definition. Perhaps never before has Congress explicitly defined the meaning of an Amendment. But in this instance, so closely allied is the enforcement act with the amendment that definitions of "intoxicating liquor" become in effect a part of the amendment.

"The phrase 'intoxicating liquor' is of supreme importance in the Eighteenth Amendment; without it, nothing else matters."

Judge Evans, *Ortel vs. Gregory*, 274 Federal at Page 794.

In fixing the intoxicating ingredient at one-half of one per cent., Congress departed far from accepted facts. That it had power to do so, no one doubts, but it insured a rational enforcement within the meaning and purport of the Amendment as directed at the beverage traffic by including, within the definition, only compounds fit for use for beverage purposes. This definition was intended by Congress to be complete and exclusive of all substances not specifically mentioned or classified therein. So its form indicates, conclusively, for it proceeds from a specific denomination of alcohol, brandy, etc., to the broadest conceivable classification of liquor, liquids and compounds * * * which are fit for use for beverage purposes.

Surely, there can be no question regarding the concluding phrase. It implies a test thoroughly consonant with the spirit and letter of the amendment, and to admit into the law a compound, admittedly unfit for beverage purposes, upon the theory that the definition is merely inclusive, is not only to disregard or supplement an incomplete category, but to evade a general qualification, or condition, imposed by Congress, which, by its very nature, must be complete and exclusive.

The general purport of the law is again emphasized by the provisions of Section IV, exempting from the provisions of the Act

"(a) Denatured alcohol, produced and used, etc. * * *"

The penal provisions of Section IV, of which plaintiff in error stands convicted, are in effect isolated enactments, apart from the lawful tenor of the Act, and outside the authority of Congress as derived from the Amendment to enact appropriate legislation.

Now, it may be contended that the amendment does not contain the words "fit for use for beverage purposes," but prohibits the manufacture, sale, etc., of intoxicating liquor for "beverage purposes," and that, therefore, the grant of power is broader than Congress chose to exercise in the act, that a poisonous liquor or compound, if intoxicating, and sold for beverage purposes, would be within the purview of the amendment, but intoxicating liquor, as defined by Congress, is intoxicating liquor referred to in the amendment, so that the amendment must be held to prohibit the manufacture, sale, etc., of intoxicating liquor (fit for use for beverage purposes) for beverage purposes.

It was urged in the Court's memorandum that the amendment and the statute strike at a practice and not at a thing, and that Congress, governed only by this broad principle, is not constricted in its legislation within the definition of things which are properly beverages or fit for use for beverage purposes. The amendment undoubtedly relates both to a practice and a thing; it could not do otherwise, because the amendment and the enforcement act strike at the beverage traffic in liquor, which in its last analysis, was a practice having to do with a certain thing, intoxicating beverage liquor. To attempt to legally separate one from the other is not to define but to dismember the amendment and statute.

A reasonable view would necessarily define that practice to relate to the traffic in intoxicating beverages for beverage purposes. Can it rationally be supposed

to relate to traffic in any liquid, which, though admittedly unfit for use for beverage purposes, might cause intoxication? Such an interpretation would bring us to the view that Congress could include within its legislature such chemicals as tincture of ginger, which, diluted, might be used as an intoxicant, as exemplified in *Bertrand vs. State*, 73 Miss. 51, 18 S. 545, and the term "intoxicating liquor" instead of being beverage liquor, as contemplated in the amendment, would be synonymous with liquid, as in the State of Washington, under the local statute.

The word "beverage" as used in the Eighteenth Amendment, is employed in its ordinary meaning of a liquid for drinking. *Falstaff Corporation vs. Allen*, 278 Federal, 643.

Indeed, a plenary grant of power to legislate on this subject was received by Congress,—*Rhode Island vs. Palmer*, 253 U. S. 350: *Falstaff Corporation vs. Allen*, 278 Federal, 643: *Piel vs. Day*, 278 Fed. 223, and the Courts have no power to review the discretion of Congress necessary and appropriate to enforce the provisions of the amendment, *Street vs. Lincoln Safe Deposit Company*, 267 Fed. 706, unless the enactment has no substantial relation to the enforcement of constitutional prohibition. *U. S. vs. Freund*, 290 Fed. 411-412.

But if the purpose of the amendment is confined to acknowledged beverages, or compounds, etc., fit for use for beverage purposes, then the right in Congress to exercise police power, under Section 2 of the Amendment, coming as it must from the Amendment only, can be no broader than the Amendment, and can relate only to intoxicating liquor as contemplated by the Amendment, and defined in the statute, unless the Amendment be construed to be a general grant of police power co-extensive

with that formerly inherent in the States only, or as possessed by Congress in the District of Columbia.

> "Police power is the power inherent in a government to enact laws within constitutional limits, to promote the order, safety, health, moral and general welfare of society."
>
> *C. J. Constitutional Law.*

If the general police power of the States is limited and restricted by constitutional provisions, surely it would follow reasonably that a grant of police power to Congress in the Eighteenth Amendment should be limited by the tenor and purpose of the Amendment, and not be extended to the sale of poisonous liquids.

II.

Title III of the Volstead Act relates to industrial alcohol. Provision for the use of alcohol in the art and industries had been made before the advent of the Eighteenth Amendment by the Acts of June 7th, 1906, the amendatory act of March 2, 1907 and sub-section II Paragraph "N" of Section IV of the Act of October 3rd, 1913, all of which may be found quoted as a preface in Regulation 61 of the Treasury Department. These statutes make provision for the withdrawal of alcohol for denaturation, free from the tax imposed on alcohol when used for beverage purposes.

Title III of the Volstead Act was enacted in order to preserve the purpose of and supplement these statutes in view of the situation developed by the Eighteenth Amendment.

Section V of Title III provides that tax is attached to the alcohol as soon as it is in existence as such and affects the collection of all taxes due the government

before denaturation takes place and before the denatured product leaves the distillery for general distribution, as unfit for use as an intoxicating beverage.

Section XV of Title III provides penalties for a violation of the Title or "of the regulations lawfully made thereunder."

Elaborate regulations have been promulgated by the Treasury Department, known as Regulations 60 and 61. Regulation 61 relates exclusively to industrial alcohol, and Article 108, pertinent to this issue, has already been quoted. Only if this be a lawful regulation within the scope of the Commissioner's power, as derived from Title III of the Statute, may it properly be, as a matter of law, an offense contemplated by Section 37 of the Criminal Code.

That Congress may empower departmental officers to promulgate regulations, having the force of law, to effectuate its own legislation, is uncontested.

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations."
>
> *U. S. vs. Grimaud,* 220 U. S. 507.

But this power is subject to restriction. The regulations must be administrative of and not additive to the statute. *U. S. vs. Anti-Kamnia Company,* 231 U. S. at Page 666, 58 L. Ed., 419. In this case, in speaking of the functions of the Secretary of the Treasury, Secretary of Agriculture, and the Secretary of Commerce and Labor, who were empowered by the Food and Drugs Act to make certain regulations for its enforcement, the Supreme Court said:

> "It is undoubtedly one of regulation only, an administrative power, not a power to alter or add to the act."

The lawfulness of departmental regulations is to be tested by their relevancy to and restrictions within the tenor, meaning and purport of the act which authorizes them,—*U. S. vs. George,* 228 U. S., 14, 22, 33; 57 L. Ed. 712, and, with reference to the Volstead Act, no officer has a right to exercise authority, or to promulgate rules and regulations except as they have basis in the original Prohibition Act. *Fiedler vs. Moss,* 287 Fed. 934. *Ortel Company vs. Gregory,* 270 Fed. 789.

We contend that Article 108 is not within these principles and does not meet the requirements of this test.

The Volstead Act is a bifurcated statute, Title II, concerned with beverage liquors, deriving its authority from the Eighteenth Amendment only, Title III, concerned with industrial non-beverage compounds, deriving its authority chiefly from the general taxing power of Congress, it being the purpose of Title III to exempt alcohol under certain conditions from the effect of the amendment and the provisions of the Volstead Act, in deference to the needs of industry and the arts. If we had not the amendment, Congress would have no power with reference to alcohol, beverage, or non-beverage, except from the taxing power, and with the amendment it retains control from both sources while it remains fit for beverage purposes, and from the taxing power, only after denaturation renders it unfit for such purposes. Such is our view of this statute.

It must be borne in mind that Title II, Section IV, third paragraph, provides specific offenses with reference to denatured alcohol. Assuming that such provisions come within the scope of the amendment, the unlawful sales specified in this section may not be added to by the regulations, and this seems to be the expressed intention

of Section IV, Title II, which exempts, from the operation of the act, "denatured alcohol produced and used as provided by laws and regulations now or hereafter in force," no reference being made to sales except in the subsequent paragraph of Section IV, Title II, defining unlawful sales, already quoted, so that the effect of Article 108 of Regulations 61 is to make it an offense to sell completely denatured alcohol without affixing the prescribed label, and it is immaterial whether or not such sale be for beverage purposes or, under circumstances from which the seller might reasonably deduce the intention of the purchaser, to use them for such purposes (Section IV, Title II).

Now, is this an administrative act, or is it additive to the statute? We contend it constitutes legislation by the Commissioner, because the Commissioner, promulgating regulations under Title III, and we suppose there can be no question that he derives his authority from that title only, cannot, directly or indirectly, in effect, add to the offenses defined and specified in Title II, but that he is confined to the purpose and spirit of Title III, which does not relate to beverage alcohol and its manufacture and distribution as such.

But it may be urged that the legislative basis of this regulation is not in the amendment or in Title II but in the taxing power of Congress, and the regulation is administrative of that power, and of the statutes enacted under it, including Title III.

How far can the taxing power be extended?

> "Alcohol, lawfully denatured, may, under regulations, be sold free of tax, either for domestic use or for export."
>
> *Volstead Act, Title III, Section 10.*

What is the significance of this Section with reference to Article 108, Regulations 61, as applied to a druggist who makes retail sales in small quantities, (less than five wine gallons). Counsel have diligently searched the Revenue Laws and Regulations and can find no provision for the payment of the tax on such sales of completely denatured alcohol, with or without a label, or under any circumstances, so that the provision is nothing more than a permission having no force of law. If a sale of completely denatured alcohol occurs, without the affixed poison label, what tax law has been violated? For comparison, if narcotics are sold in violation of the Harrison Act, (Act of July 17, 1914, c. 10—38 Statutes, L. 277), the offense is related directly to an obligation to pay a tax as a dealer in narcotics, and the constitutional authority of the government, with reference to such an offense, has been established, *U. S. vs. Doremus,* 249 U. S. 86, 63 L. Ed. 282, but no such relationship exists here between the amendment or the statute, and Article 108, Regulations 61, which has no legislative basis, either in the amendment or in Title II of the Volstead Act, and none in Title III of that Act, except in the bare permissive provision of Section 10, Title III, which we submit is without force of law. Article 108 of Regulations 61 defines an offense solely within the police power of the States and of the provisions of Section 12708-3, which is identical in its provisions with Article 108, Regulations 61.

Respectfully submitted,

J. C. Breitenstein,
G. J. Pilliod,
B. H. Schwartz,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1924

MEYER SELZMAN, PLAINTIFF IN ERROR
v.
THE UNITED STATES
No. 998

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

STATEMENT

Plaintiff in error was convicted in the United States District Court for the Northern District of Ohio of conspiracy, under Section 37, Criminal Code, to violate Title III of the National Prohibition Act, and the regulations made in pursuance thereof, by selling completely denatured alcohol in packages containing less than five wine gallons without having affixed thereto the proper labels. (R. 1, 18.)

He was also convicted under another indictment, consolidated for trial with the above case (R. 15), of selling denatured alcohol under circumstances

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from which he might reasonably have deduced the intention of the purchaser to use said alcohol for beverage purposes, contrary to the provisions of Section 4, Title II, of the National Prohibition Act. (R. 5, 18.)

In the first case, involving the conspiracy statute, plaintiff in error was sentenced to the Atlanta Penitentiary for two years and to pay a fine of $500. (R. 21.) In the second he was sentenced to several terms, to be served consecutively, in the Dayton, Ohio, Workhouse; service to commence at the expiration of the penitentiary sentence imposed in the first case. (R. 21, 29.)

Motions for a new trial, in arrest of judgment, and to modify sentence, were overruled. (R. 23.)

A direct writ of error brings the case here.

THE FACTS

Plaintiff in error, a registered pharmacist, as the testimony tended to show, established a practice in his drug store, by instructions to his clerks and through his own example, of selling, in violation of the regulations, denatured alcohol without the poison label to anyone whose clothing and appearance indicated that he was a derelict and, presumably, of such low social standing that injury to him would not be likely to excite active investigation. Several of plaintiff in error's customers of this character died of alcoholism shortly following their purchases, including one of the purchasers pleaded as such in the indictment.

In passing on the motion to modify sentence the court below said (R. 25):

> A claim that to inflict the extreme penalty on each one of these aggravated sales, under circumstances such as these, is cruel and unusual carries its own answer. It would have been travesty not to have given such a calloused indifference to human suffering the extremest consideration. Death ensuing, with proof of the corpus delicti presented, the situation would have been at least manslaughter at common law and by Ohio statutes murder in the second degree.

THE ISSUES

Plaintiff in error contends that Title III of the National Prohibition Act, relating to industrial alcohol, is unconstitutional, because the taxing power of the Government, as created by statute, extends to the alcohol only until denatured; that after denaturation the alcohol is subject to distribution free from Government supervision or authority; that the Commissioner of Internal Revenue no longer has power or control over it within the scope of the statute under which his pretended authority is claimed, and that therefore the regulations in question had not the force and effect of law; and a prosecution for conspiracy to violate same can not be maintained.

It is also contended that Section 4, Title II, of the Act is unconstitutional, because Congress had no authority, under the Eighteenth Amendment

or otherwise, to penalize the sale of denatured alcohol, a nonbeverage product, for beverage purposes.

ARGUMENT

I

Title III of the National Prohibition Act, and the regulations based thereon, are constitutional and valid

It has long been settled that Congress may direct an administrative bureau to establish regulations to carry legislation into effect, and that such regulations have the force and effect of law. Congress may go farther and provide that a violation of such regulations shall constitute a criminal offense punishable as defined by the statute. *United States* v. *Grimaud,* 220 U. S. 506.

The regulation in question was promulgated in pursuance of Section 13, Title III, of the National Prohibition Act (Chap. 85, 41 Stat. 305), which provides, in part:

> The Commissioner [of Internal Revenue] shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, *to secure the revenue, to prevent diversion of the alcohol to illegal uses,* etc. [Italics ours.]

The regulation violated reads, in part, as follows:

> Every package of completely denatured alcohol containing less than 5 wine gallons, sold or offered for sale by denaturers or dealers, must have affixed thereto a label on which must be printed, in plain, legible letters (red on white), the words, "Completely denatured alcohol," and, in addition, on the same label, there shall be printed in large letters, in red ink, under the skull and bones symbol, the word "POISON," together with the following statement: "Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissues without serious injurious results. It can not be taken internally without inducing blindness and general physical decay, ultimately resulting in death." (Art. 108, Regulations 61, United States Internal Revenue, relating to industrial and denatured alcohol, July, 1920.)

It can not be seriously contended that the provision of a label advising of the lethal character of the liquor for internal use is not a wise provision to prevent diversion of the alcohol to illegal uses. In fact, the reasonableness of the regulation, as such, is not attacked. If, therefore, Congress had the power to confer upon the Commissioner of Internal Revenue the duty of devising necessary regulations, the conclusion is inevitable that a violation of the regulation is an offense against the United States. Section 37 of the Criminal Code, making it a crime to conspire to commit an offense against the United States, covers such a situation.

This Court in *Haas* v. *Henkel,* 216 U. S. 462, 479, said:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.

See also *United States* v. *Foster,* 233 U. S. 515.

But it is claimed that the entire Title III of the National Prohibition Act is unconstitutional. It is conceded that the adoption of the Eighteenth Amendment and the enactment of the Volstead Act developed a situation which Title III was intended to solve, and the Government then dealt with the problem of industrial alcohol, not only from the viewpoint of its taxing power but also from the viewpoint of its control over beverage alcohol; that provision is made for the manufacture, withdrawal, and preparation for sale and denaturation of alcohol, and that as to these subjects the Government had full authority and control and the Commissioner could lawfully issue regulations affecting the same, so far as within the scope of his jurisdiction. But it is contended that the tax is collected by the Government at the source of manufacture or denaturation; that when the alcohol in its industrial form leaves Government control the tax has been paid and the taxing interest of the Government ceases from that moment; that, being denatured, the alcohol is a poisonous product, not fit for beverage purposes within the meaning of the

Eighteenth Amendment and the Volstead Act, and that the Government control over it as a beverage must cease from that moment also.

This argument proceeds upon the theory that nonbeverage intoxicating liquor can not be the subject of legislation in an effort to make effective the direction of the Eighteenth Amendment that Congress shall pass "appropriate" laws to restrain the sale of intoxicating liquor as a beverage. In other words, that any provision under the Amendment making it an offense to sell nonbeverage intoxicating liquor for beverage purposes is unconstitutional.

Reduced to its final analysis, the question is whether it was "appropriate" legislation for Congress to include in the National Prohibition Act provisions intending to strike at the diversion of industrial alcohol, a poisonous nonbeverage intoxicant, to beverage purposes.

The Eighteenth Amendment provides that "the manufacture, sale, or transportation of intoxicating liquors within * * * the United States * * * for beverage purposes is hereby prohibited" (Sec. 1); and that "Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation" (Sec. 2).

The National Prohibition Act enacted in pursuance of this Amendment provides that no person shall "manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor" except as authorized in the Act; that

all its provisions shall be liberally construed to the end that "the use of intoxicating liquor as a beverage" may be prevented, and that intoxicating liquor "for nonbeverage purposes" may be manufactured, sold, etc., "but only" as provided in the Act and the Commissioner of Internal Revenue may issue permits therefor (Sec. 3, Title II); that denatured alcohol shall not be subject to the provisions of the Act if "produced and used as provided by laws and regulations now or hereafter in force" (Sec. 4, Title II); that no one shall manufacture, sell, etc., intoxicating liquor without first obtaining a permit from the Commissioner, with exceptions not here material (Sec. 6, Title II), nor manufacture, sell, or transport any liquor without making at the time a permanent record thereof, etc. (Sec. 10, Title II); and that after February 1, 1920, the possession of liquors by any person not legally permitted "under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purposes of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title" (Sec. 33, Title II).

The purpose and effect of the Eighteenth Amendment are now well understood. They are to put an end to the traffic in intoxicating liquors for beverage purposes. See *Grogan* v. *Walker,* 259 U. S. 80, 89. The power of Congress in this respect, as held by this and other courts, is of such breadth and comprehensiveness as to include in

its legitimate application the control and regulation of all means by which the evil sought to be controlled may have operation. The Eighteenth Amendment must be respected and given effect the same as other provisions of the Constitution. *National Prohibition Cases,* 253 U. S. 350, 386.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. (Art. I, Sec. 8, Cl. 18.) In the exercise of such nonenumerated or "implied" powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *Everard's Breweries* v. *Day,* 265 U. S. 545, 559. But, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce the prohibition "by appropriate means." *National Prohibition Cases, supra,* p. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, courts

may not inquire into the degree of their necessity, as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Legal Tender Case,* 110 U. S. 421, 450; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. Nor may courts inquire as to the wisdom of the legislation or the motives of Congress. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161. What courts may consider is whether that which has been done by Congress has gone beyond the constitutional limitation upon its legislative discretion. *Ex Parte Curtis,* 106 U. S. 371, 373.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any appropriate means to make that prohibition effective. An incidental result is to clothe Congress with a police power which theretofore was exercisable only by the several States. Inherent in the enjoyment of such power is the authority of Congress to legislate effectively—to make successfully operative the Amendment—and in so doing the legislation may prohibit acts otherwise and theoretically innocuous. It has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although nonintoxicating. *Purity Extract Company* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264.

This Court by an unbroken line of decisions has "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544. Because legislative acts are presumed to be constitutional, it follows that Congress should be permitted to enjoy exclusively the right to judge the means to effect a constitutional purpose and the necessity which calls forth the employment of such means; that its judgment must stand, unless courts are able to see too clearly to be subject to reasonable criticism that its action is improvident and beyond legislative limitations. *Interstate Railway* v. *Massachusetts,* 207 U. S. 79; *Mugler* v. *Kansas,* 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, 163.

Applying the foregoing principles to the instant case, the Government submits that it can not be said that the provisions of Title III of the National Prohibition Act are so clearly unreasonable as to be beyond the constitutional power of Congress. The limitations and restrictions therein contained, and of which complaint is made, were necessary and appropriate and were clearly adopted for the purpose of preventing the diversion of industrial alcohol for beverage purposes. Denatured alcohol is in fact intoxicating. In spite of its poisonous character, people will use it for beverage purposes, as is shown by this and other cases prosecuted by the Government. Moreover, by redistilla-

tion and other methods the poison may be extracted so as to render the alcohol more palatable and fit for beverage purposes. But, whether regarded as a beverage or nonbeverage intoxicant, the fact remains that it is being used for beverage purposes. In such a situation, it was as much within the power of Congress to enact Title III, in its attempt to pass appropriate legislation, as it was to prevent the traffic in so-called beverage intoxicating liquor. In fact, Title III was as necessary and important to effective prohibition enforcement as was Title II of the Act. Congress sought, in the enactment of the National Prohibition Act, to cover the entire field of an enforcement act that would be reasonably practicable and fully effective. It attempted to pass an act that would make the selling of *any* liquor that was intoxicating, if the sale was for beverage purposes, an offense. Without the enactment of Title III, the Eighteenth Amendment and the provisions of Title II of the Volstead Act, above set forth, could not be enforced. Of a similar situation, with respect to malt liquors, this Court said in the *Everard's Breweries* v. *Day*, 265 U. S. 545, 561:

> The opportunity to manufacture, sell, and prescribe intoxicating malt liquors for "medicinal purposes" opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges, and artifices; aids evasion; and thereby and to that extent ham-

pers and obstructs the enforcement of the Eighteenth Amendment.

So here, but for the provisions of Title III, the constitutional amendment and the National Prohibition Act could not be made effective. By various subterfuges and frauds alcohol intended for industrial purposes would constantly be diverted to beverage purposes. Under these circumstances it seems clear that Congress had power to regulate the distribution of such alcohol, irrespective of whether it is known as a nonbeverage product or whether or when a tax was imposed thereon. The Amendment struck at an evil. The evil is none the less because produced by the sale and use of so-called nonbeverage intoxicants. In other words, the degree of the evil is not dependent upon the potability of the intoxicant.

In view of the decisions of this and other courts, Federal and State, upholding laws prohibiting or regulating the traffic in malt, spirituous and nonintoxicating liquors in order that prohibition may be made effective, there can be no doubt that Congress may regulate the distribution of industrial alcohol in order to prevent its diversion to beverage purposes. Title III is therefore not unconstitutional.

II

Congress had power to penalize the sale for beverage purposes of denatured alcohol, a non-beverage intoxicant

The substance of plaintiff in error's argument is that there is an inconsistency between Section 1,

Title II, of the Act, defining "liquor" or the phrase "intoxicating liquor," and Section 4, Title II, under which plaintiff in error was convicted, and which attempts to penalize the sale for beverage purposes of certain nonbeverage intoxicants as being included in the term "liquor" or the phrase "intoxicating liquor" defined in Section 1, but which are not enumerated therein.

Section 1 reads, in part, as follows:

> When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes.

Section 4 provides, in part:

> The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:
>
> (a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.
>
> * * * * *

> Any person who shall knowingly sell any of the articles mentioned in paragraphs a [denatured alcohol], b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title.

It is urged that because denatured alcohol is a nonbeverage intoxicant, it is excluded from the operation of the Volstead Act by virtue of the definition in Section 1.

The Government submits that the statute can not be read to mean that the word "liquor" or the phrase "intoxicating liquor" should be construed to include only the liquors enumerated and to exclude all other intoxicating liquor. The obvious purpose of Section 1 is to bring within the operation of the statute beverage intoxicants under whatever guise or name, and to define the quantum of alcohol whose presence will determine the intoxicating character for the law's purposes. The section is inclusive and definitive of certain classifications, but not necessarily does its language purport to cover the entire field of intoxicants. So to hold would be

to say that Congress failed to legislate practically and effectively on a subject over which it had complete authority under the Constitution and which had its fullest consideration.

It will be observed that in its enumeration the statute includes alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine. This is an enumeration of the commonly accepted intoxicating liquors, those generally known to the trade and to the people as intoxicating liquors. But at the time the statute was enacted there were no doubt many other intoxicating liquors used in this and other countries for beverage purposes that were not within common knowledge. Clearly one accused of selling such an intoxicant for beverage purposes could not plead immunity merely because Congress has failed to include that particular liquor in its enumeraton. That the enumeration was not intended to be complete is further shown by the fact that, after naming the commonly accepted intoxicating liquors, the statute proceeds: "in addition thereto * * * by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

The ultimate determination of whether this section should be construed as inclusive or exclusive must be based on the Eighteenth Amendment. It provides that the manufacture and sale, etc., of *intoxicating liquors "for beverage purposes is hereby*

prohibited" and Congress shall have power to enforce the Amendment by appropriate legislation. [Italics ours.] To hold that this section includes only the intoxicants therein named would be to admit that Congress, in defining the field of intoxicants, has fallen into a grave error, namely, that of excluding from the operation of the Amendment those intoxicants which ordinarily are not fit for beverage purposes, but which have intoxicating capacity if so used. Such a construction would suggest that Congress has neglected the full performance of its duty and has left open a mischievous field—an opportunity to purvey unpalatable but intoxicating liquors, without any punitive result. It is presumed that Congress approaches its duty in an effort to perform it fully. The construction contended for by plaintiff in error would be an unreasonable one. Certainly it is not forced by the language of the Act. The language is that the words "intoxicating liquor" shall be construed to *include*. There is no necessary inference, in an enumeration of what shall be included in a phrase, that intoxicating liquors not named shall be excluded, especially when the evident purpose of the Act is to cover the whole field of intoxicants.

It is submitted that the statute should not be construed as exclusive, but as intended to include intoxicating liquors other than those specifically named, and especially a nonbeverage intoxicating

liquor sold and used, as in this case, for beverage purposes. This is a reasonable and practical construction of the statute and is consistent with the duty and evident purposes of Congress to employ fully all its powers derived from the Amendment. Statutes should be construed practically, if reasonably possible, so that their purposes may be completely effectuated. Accordingly the Government submits that the word "liquor," wherever its sale for beverage purposes is denounced, should be construed as that liquor which is intoxicating in fact or by legal definition, whatever may be its palatability.

As in the case of Title III relating to industrial alcohol, referred to above, Congress had ample power to enact Section 4, penalizing the sale of denatured alcohol for beverage purposes. By the Eighteenth Amendment Congress was empowered to pass a law making the prohibition of the sale of intoxicating liquors broadly effective. This power necessarily carried with it the authority to enact legislation prohibiting the sale for beverage purposes, whether directly or indirectly, of a nonbeverage intoxicant such as denatured alcohol included in Section 4.

CONCLUSION

It is submitted that the statutes and the regulation under which plaintiff in error was convicted were constitutional and valid, and that the judg-

ment and sentence appealed from should be affirmed.

Respectfully.

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
MAHLON D. KIEFER,
Special Assistant to the Attorney General.

APRIL, 1925.

○

SELZMAN *v.* UNITED STATES.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 998. Submitted April 27, 1925.—Decided June 1, 1925.

1. Under the Eighteenth Amendment Congress has power to prevent or regulate the sale of denatured alcohol which is not usable as a beverage. P. 467.
2. The power of the Federal Government, granted by the Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative measures reasonably adapted to promote the purpose. P. 468.

Affirmed.

ERROR to a judgment of the District Court based on convictions under two indictments, the one charging conspiracy to violate the Prohibition Act and regulations, in offering denatured alcohol for sale without the required labels, the other charging sale of it for beverage purposes, etc.

Messrs. Gerald J. Pilliod and *J. C. Breitenstein*, with whom *Mr. B. H. Schwartz* was on the brief, for plaintiff in error.

The Solicitor General, with whom *Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Meyer Selzman was tried and convicted on two indictments in the District Court. The first charged him, Martin Bracker, Harry Porter and others with a violation of § 37 of the Criminal Code in conspiring to violate

§ 15, Title III, of the National Prohibition Act (enacted October 28, 1919, c. 85, 41 Stat. 305) and the regulations relating to the manufacture and distribution of industrial alcohol prescribed by the Commissioner of Internal Revenue, pursuant to the provisions of Title III of the Act, in that they knowingly offered for sale completely denatured alcohol in packages containing less than five wine gallons, without having affixed to the packages a label containing the words "Completely denatured alcohol", together with the word "Poison" and a statement of the danger from its use. *United States* v. *Grimaud,* 220 U. S. 506.

Selzman was also convicted under four counts of the second indictment of violating § 4 of Title II of the Act forbidding the sale of denatured alcohol for beverage purposes or under circumstances from which the seller may reasonably infer the intention of the purchaser to use it for such purpose.

This is a writ of error under § 238 of the Judicial Code, on the ground that the provisions of the Prohibition Act in respect to denatured alcohol under which these indictments were found exceed the power of Congress. Whether this is a sound contention is the only question for our decision.

It is said that the Eighteenth Amendment prohibits the manufacture, sale and transportation of intoxicating liquor for beverage purposes only, and that, as denatured alcohol is not usable as a beverage, the amendment does not give to Congress authority to prevent or regulate its sale, and that such authority remains with the States and is within their police power exclusively.

Reference is had to the part of § 1 of Title II of the Prohibition Act (41 Stat. 307), as follows:

"Sec. 1. When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy,

whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

This, it is said, is a proper construction and limitation of what the Eighteenth Amendment was intended to prohibit and excludes denatured alcohol, although intoxicating, because not fit for beverage purposes. The argument is without force.

In order that the uses of alcohol might not be lost to the arts by reason of the then heavy internal revenue tax, Congress made provisions (Act of June 7, 1906, c. 3047, 34 Stat. 217, Act of March 2, 1907, c. 2571, 34 Stat. 1250, and Act of October 3, 1913, c. 16, § IV, N, sub-sect. 2, 38 Stat. 114, 199) by which alcohol was made tax free if denatured so that it could not be used for a beverage and evade the federal tax on the potable article. Any attempt to recover the alcohol thus denatured for beverage purposes was punished. The plaintiff in error's suggestion is that this was then within the power of Congress because necessary to protect its power of levying an excise tax on liquor under Section 8, Art. 1, of the Constitution; but that as there is now no tax upon alcohol to protect, denatured alcohol has passed out of the domain of Congressional action. But surely the denaturing of alcohol is now as necessary in maintaining its use in the arts and prohibiting its use as a beverage, as it was formerly needed to permit its use in the arts and to prevent its consumption as a beverage without paying the tax. The power of the Federal Government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative meas-

ures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it. The conclusion is fully supported by the decisions of this Court in *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 282, and *National Prohibition Cases*, 253 U. S. 350, Par. 11. See also *Huth* v. *United States*, 295 Fed. 35, 38.

Affirmed.